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**CASES ARGUED AND DECIDED**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSISSIPPI**

**AT THE**  
**MARCH TERM, 1921,**  
  
**VOL. 125.**

**REPORTED BY**  
**ROBERT POWELL**

**COLUMBIA, MO.**  
**E. W. STEPHENS PUBLISHING CO.**  
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## CASES REPORTED

---

### A.

A. Golitti, Inc., v. Andrew Gray Co. ....	646
Adams, Belt et al. v. ....	387
Adams v. Young et al. ....	748
Adams County v. National Box Co. ....	598
Alabama & V. Ry. Co. v. Joseph et al. ....	454
Alexander et al., Quinn v. ....	690
Amer. Packing Co., Employers' Liability Assur. Corp. v. ....	874
Andrew Gray Co., A. Golitti, Inc., v. ....	646
Angeletty, Bernstein v. ....	656
Armstrong v. Employers' Liability Assur. Corp. ..	570

### B

Baldwin v. State ....	561
Barber v. State ....	138
Barnwell, Cain et al. v. ....	123
Batson, Mutual Life Ins. Co. v. ....	789
Beale v. Yazoo Yarn Mill ....	807
Beekman et al. v. Bost ....	77
Belt et al. v. Adams ....	387
Belzoni Land Co. v. Robertson ....	338
Bernstein v. Angeletty ....	656
Berry, Fronkling v. ....	763
Bishop, Nelson v. ....	256
Board of Supr's., McGraw v. ....	420
Board of Supr's., Parker v. ....	617
Bonds v. Mobile & O. R. Co. ....	547
Bost, Beekman et al. v. ....	77
Brower et al. v. Rosenbaum & Little et al. ....	87
Brownlee Lumber Co. v. Gandy ....	71
Buckeye Cotton Oil Co. v. Saffold ....	407
Buckley et al. v. City of Jackson ....	780
Burdett v. Hines ....	66

### VII

## C

Cahaba Const. Co., et al. McBee & Gossett v. ....	227
Cain et al. v. Barnwell .....	123
Citizens Bank & Trust Co., Smith v. ....	139
City of Biloxi, Gulfport & M. C. Traction Co. v. ....	626
City of Corinth et al. v. Robertson .....	31
City of Jackson, Buckley et al. v. ....	780
Crosby v. State .....	433
Crudup v. Roseboom .....	205

## D

Davis, Federal Agent, v. Hambrick et al. ....	859
Dedeaux v. State .....	326
Dockery, Minor v. ....	727
Dye et al., Moody & Williams v. ....	770

## E

Ellis et al. v. Tillman et al. ....	678
Employers' Liability Assur. Co. v. American Packing Co. ....	874
Employers' Liability Assur. Corp. Armstrong v. ..	570

## F

Fraternal Aid Union v. Whitehead .....	153, 661
Freedman's Aid & Southern Education Soc. v. Scott	299
Fronkling v. Berry .....	763
Funches v. State .....	140

## G

Gandy, Brownlee Lumber Co. v. ....	71
Garner, Sovereign Camp W. O. W. v. ....	8
Globe Trust Co., Mexican Gulf Land Co. v. ....	862
Green, Hines, Agent v. ....	476
Greenwood Agency Co., Lee v. ....	177
Gulfport & M. C. Traction Co. v. City of Biloxi ....	626

## H

Hall, Maryland Casualty Co. v. ....	792
-------------------------------------	-----

Hambrick et al., Davis, Federal Agent, v. ....	859
Hartshorn, Tallahatchie Compress & Storage Co. v. ....	662
Hawie v. State .....	589
Hendrix, Wilson v. ....	273
Hines, Agent, v. Green .....	476
Hines, Burdett v. ....	66
Hines, Mock v. ....	111
Holliman, Tallahala Lumber Co. v. ....	308
Hook & Co, v. Miller .....	1
Humphrey et al. v. Seale .....	207
Hundley, State ex rel. v. ....	355

## I

Illinois Cent. R. Co. v. King .....	734
-------------------------------------	-----

## J

Jenny v. Smith-Powell Realty Co. ....	608
Jones, Ridgeway et al. v. ....	22
Joseph et al., Alabama & V. Ry. Co. v. ....	454

## K

King, Illinois Cent. R. Co. v. ....	734
Klein et al., Lowenburg v. ....	284
Kyzar v. State .....	79

## L

Lawson v. State .....	754
Lee v. Greenwood Agency Co. ....	177
Lee, National Surety Co. v. ....	517
Lincoln County v. Wilson et al. ....	837
Lowenburg v. Klein et al. ....	284
Lynchburg Shoe Co., Rubenstein et al. v. ....	528

## M

McBee & Gossett v. Cahaba Const. Co. et al. ....	227
McGraw v. Board of Supr's. ....	420
McLaughlin v. R. W. Fagan Peel. Co. et al. ....	116
McLemore, O'Keefe et al. v. ....	394
McNeill v. McNeill .....	277

McNeill, McNeill v. ....	277
McPherson et al. v. Richards et al. ....	219
Maryland Casualty Co. v. Hall ....	792
Meriwether v. State ....	435
Metts et al., State ex rel. v. ....	819
Mexican Gulf Land o. v. Globe Trust Co. et al ....	862
Miller, Hook & Co. v. ....	1
Miller, Sovereign Camp W. O. W. v. ....	502
Minor v. Dockery ....	727
Mobile & O. R. Co., Bonds v. ....	547
Mobile & O. R. Co. v. Strain ....	697
Mock v. Hines ....	111
Monroe Co., Shell et al. v. ....	562
Moody & Williams v. Dye et al. ....	770
Moore v. Swamp Bridging Co. ....	842
Mullins, Yazoo & M. V. R. Co. v. ....	242
Mutual Life Ins. Co. v. Batson ....	789
Mutual Life Ins. Co. v. Vaughan ....	369

## N

National Box Co., Adams County v. ....	598
National Surety Co. v. Lee ....	517
Nelson v. Bishop ....	256
Norman, Yazoo & M. V. R. Co. v. ....	636

## O

O'Keefe et al. v. McLemore ....	394
O'Keefe, Yazoo & M. V. R. Co. v. ....	536

## P

P. L. Renoudet Lumber Co., Slaterry v. ....	229
Payne, Director General v. Stevens et al. ....	582
Payne v. State et al. ....	896
Parker v. Board of Supr's. ....	617
Perkins, et al. Smith v. ....	203

## Q

Quinn v. Alexander et al. ....	690
--------------------------------	-----

## B

R. W. Fagan Peel Co., et al. McLaughlin v. ....	116
Ramsay v. Ramsay .....	185, 715
Ramsay, Ramsay v. ....	185, 715
Richards et al., McPherson et al. v. ....	219
Ridgeway et al. v. Jones .....	22
Robertson, Belzoni Land Co. v. ....	338
Robertson, City of Corinth v. ....	31
Roseboom, Crudup v. ....	205
Rosenbaum & Little et al., Brower et al. v. ....	87
Rubenstein et al. v. Lynchburg Shoe Co. ....	528

## S

Saffold, Buckeye Cotton Oil Co. v. ....	407
Scott, Freedmen's Aid & Southern Education Soc. v. ....	299
Seale, Humphrey et al. v. ....	207
Shell et al. v. Monroe Co. ....	562
Shields, Tonkel v. ....	461
Shireman et al. v. Wildberger et al. ....	199, 499
Slattery v. P. L. Renoudet Lumber Co. ....	229
Smith v. Citizens Bank & Trust Co. ....	139
Smith v. Perkins et al. ....	203
Smith-Powell Realty Co., Jenny v. ....	608
Sovereign Camp W. O. W. v. Miller ....	502
Sovereign Camp W. O. W. v. Garner ....	8
State, Baldwin v. ....	561
State, Barber v. ....	138
State, Crosby v. ....	433
State, Dedeaux v. ....	326
State, Funches v. ....	140
State, Hawie v. ....	589
State, Kyzar v. ....	79
State, Lawson v. ....	754
State, Meriwether v. ....	435
State, Williams v. ....	347
State ex rel. v. Hundley et al. ....	355
State ex. rel. v. Metts et al. ....	819
State et al., Payne v. ....	896

Stevens et al., Payne, Director General, v. ....	582
Strain, Mobile & O. R. Co. v. ....	697
Sunflower County, Yazoo & M. V. R. Co. v. ....	92
Swamp Bridging Co., Moore v. ....	842

## T

Tallahala Lumber Co. v. Holliman .....	308
Tallahatchie Compress & Storage Co. v. Hartshorn .....	662
Tillman et al., Ellis et al v. ....	678
Tonkel v. Shields .....	461
Tucker, Van Noy Interstate Co. v. ....	260
Turner, Weaver v. ....	250

## V

Van Noy Interstate Co. v. Tucker .....	260
Vaughan, Mutual Life Ins. Co. v. ....	369

## W

Washington County v. Yazoo & M. V. R. Co. et al. ..	718
Weaver v. Turner .....	250
Whitehead, Fraternal Aid Union v. ....	153, 661
Wildberger et al., Shireman et al. v. ....	199, 499
Williams v. State .....	347
Wilson v. Hendrix .....	273
Wilson et al., Lincoln County v. ....	837

## Y

Yazoo & M. V. R. Co. v. Mullins .....	242
Yazoo & M. V. R. Co. v. Norman .....	636
Yazoo & M. V. R. Co. v. O'Keefe .....	536
Yazoo & M. V. R. Co. v. Sunflower County .....	92
Yazoo & M. V. R. Co. et al., Washington County v. ....	718
Yazoo Yarn Mill, Beale v. ....	807
Young et al., Adams v. ....	748

CASES ARGUED and DETERMINED.  
IN THE  
SUPREME COURT OF MISSISSIPPI  
AT THE  
MARCH TERM, 1921.

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G. D. HOOK & Co. v. MILLER.

[87 South. 451, No. 21429.]

**BROKERS.** *Commission not recoverable from third person on exchange of land without contract, unless relation disclosed.*

Where a real estate agent advertised certain property for sale, from which advertisement a correspondence ensued between the agent and a third party, finally resulting in an exchange of lands between the agent's client or customer and the third party, the agent cannot recover a commission of the third party without an express contract, unless he discloses to the third party his relation to the other party.

**APPEAL** from circuit court of Clay county.

HON. THOS. B. CARROLL, Judge.

Action by G. D. Hook & Co. against William Miller.  
Judgment for defendant, and plaintiff appeals. Affirmed.

*Kimbrough & Valentine* and *W. N. Ethridge*, for appellant.

Appellant is entitled by law of the land to a reasonable commission, the amount depending upon the amount allowed by customs locally prevailing among this particular class of brokers or dealers or agencies. 19 Cyc., p. 284 (Note); 9 Corpus Juris, p. 590 (Note); 27 L. R. A. (N. S.), p. 1089; 43 L. R. A. (N. S.) p. 91; 5 So. Rep. 157 (Ala.).

125 Miss.]

(1)

Appellant takes it to be the law of the land that if a broker, dealer, or agency, uses no discretion, but merely brings together the parties to an exchange or the purchase and sale of property and his employment, then terminates and the parties themselves settle the terms of the transaction, he acts as a mere middle man and may accordingly recover a commission from each party if each party has agreed to pay him and it is immaterial in such case that either party was aware that said broker, dealer or agency was employed by the other. 9 Corpus Juris, 576; note 3; 24 L. R. A. (N. S.) 659; 31 L. R. A. (N. S.) 1222.

Appellant's services were the procuring cause and the commissions or compensation is due. 9 Corpus Juris, p. 611; 62 So. 254, (Ala.); 33 So. 112; 34 L. R. A. (N. S.) 1050; 139 A. S. R., p. 1050; 139 A. S. R., p. 220; 43 So. (La.) 993; 200 Fed. 897. "To bring a purchaser," to find a purchaser, etc., have no real difference in meaning if the broker, dealer or agency is the efficient cause of the parties making a trade. 9 Corpus Juris, p. 611.

The question as to what constitutes the procuring cause is answered in 9 Corpus Juris, p. 611; 40 So. 14 (Miss.).

Appellee and H. Richard Smith were brought together as a result of appellant's efforts and appellee disposed of his city property in Missouri as a result. Appellant is, therefore, entitled to commission even though not present during the negotiations following the introduction nor taking any part therein. 9 Corpus Juris, p. 615, Note 25; 40 So. 14; 9 Corpus Juris, p. 616, et seq.

In the light of all these things, appellant appeals and contends that the four divisions in the assignment of error have been sustained and that the judgment of the trial court should be reversed.

*Gates T. Ivey*, for appellee.

The question of fact was determined by the court, who rendered an opinion, appearing at page 52 of the record.

We invite attention to this opinion which appears to our mind as full of common sense. Relying upon this opinion we cite no authority, believing that court decisions can offer no aid in the solution on the question of fact so well determined by the court below.

Concluding with a brief review of the question of double agency, we may remark that while it is true in this case Richard Smith, the owner of the West Point property, paid no commission to appellants yet their relation was the same as that of double agency for the reason that they claimed to have undertaken the task and trust as brokers to find the appellee somewhere an exchange for his property. In doing so, they had contract with Richard Smith for a division of any commission which might be derived from the owners of property in Mississippi, listed either with Richard Smith or with appellants, in the exchange of which Smith should offer any assistance. If appellants had been employed as brokers for the appellee to find him property in exchange, their relation was one of confidence and their duty was one of faithfully procuring an advantageous proposition; their duty was to find for the appellee a satisfactory exchange and guard his interest in every respect. They claim to have sent appellee to Mississippi to review properties which they had listed, and confess that all of this property in the vicinity of Aberdeen and West Point, was property under which Richard Smith had control along with themselves as real estate agents for commissions. It happened that Smith sold his own property and under the arrangement no commission was paid, but the transaction with Miller, had the claim of appellants been true that they were acting as his brokers, was nevertheless stained with a double dealing, for Miller had no knowledge whatever of the fact that he was in the hands of Richard Smith, an associate of appellants, paid by the owners to do all he could to work off their property.

A certain agreement between brokers representing different principals to divide commission in case the transac-

tion is completed is void as against public policy, and deprives them of the right of compensation, 26 Am. St. Rep. 303, 54 N. E. 499, 19 Cyc. 228, article 4.

In the case of *Bell v. McConnell*, reported in 14 Am. Rep., at page 528, the court there holds that a broker acting for both parties in the sale of land cannot recover from either, even though an expressed promise to pay a commission, unless their double agency was with the consent of both parties.

The truth is, it was a part of the consideration moving to appellants in the contract existing between Smith and them, that Smith would act for them, but that in the case of the sale of this particular piece of land, there would be no commission due appellants. Appellants were, therefore, in this way paid. Under the terms of their contract they found it necessary to do all in their power to exchange Smith's lands, whether they were actually paid a pecuniary sum or not.

We feel confident that the judgment of the court below should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

The appellant was plaintiff below and filed suit for commissions against Miller for an exchange of certain property between William Miller and H. Richard Smith. The suit is predicated upon the following letter written by the appellant to the appellee:

"We have seven hundred acres nine miles from West Point, Mississippi, and four miles from station to Illinois Central Railroad. Overflowing well, fifty acres in alfalfa soil, two hundred fifty acres in black valley land—no overflow; three hundred acres fine merchantable timber; balance open cotton land. A very fine stock proposition.

"Six hundred forty acres same kind of land six miles from Aberdeen, Mississippi; improved; one mile from station on Illinois Central Railroad.

"Also three hundred twenty acres one-half mile from West Point; improved; but neglected; two hundred forty acres open. A fine stock proposition.

"Also six hundred forty acres two miles from West Point, on rock road, several cabins, all under fence, two hundred acres of timber, balance rich lime soil, about three hundred acres alfalfa soil.

"We can trade either of the above for your Dexter property. If you can come down, or let me know what time you can go to West Point, will give you a letter to a party there who will show them to you."

The correspondence between the parties originated by a letter from Miller to W. S. Barr, manager of one department of appellant's business, in reference to a stock farm advertised by the appellant in a newspaper in which Miller inquired whether the appellant would consider taking well-improved city property in Dexter, Mo., for said stock farm. The appellant replied that he could not get a trade on that property, but offered to give favorable terms if Miller would consider a purchase; also stating that if Miller would tell them what kind of property he had for trade, with certain data concerning the property, that appellant might get a trade on something else. Thereupon Miller described his property and stated that he had been offered twelve thousand dollars in St. Louis property, but preferred to either sell or trade for land in Mississippi. Thereupon appellant wrote Miller, stating that they ought to be able to find a trade for him and would do so, and asked if any incumbrance was on Miller's property, and how much loan it would stand, also how much Miller would assume on a good place, and if East Mississippi in the "black belt" suited, or would property in South Mississippi suit.

To this letter Miller replied that from five thousand dollars to seven thousand dollars could be borrowed upon his property, and that he was carrying three thousand five hundred dollars insurance on the house alone; that he had never been in Mississippi and had no information

except reading and hearsay; that he would probably call upon the appellant some time during the month, as he intended trying to locate down there in time for a crop and desired land that would grow alfalfa, corn, wheat, oats, etc., and preferred East or South Mississippi, with good shipping facilities, and referred the appellant to references to himself. Then followed the letter above quoted.

About five days thereafter Miller telegraphed appellant: "Be in Memphis in the morning about eight o'clock." According to Barr's testimony for the appellant he met Miller at the station in Memphis, and gave him the names of some parties who would show him the property embraced in the letter, giving the name of H. Richard Smith at West Point, Miss., who would show the property in that section which included the property finally exchanged. Miller proceeded to South Mississippi and thence to Meridian, and when he reached Meridian, Miss., on the way to West Point, he found he had lost the name of Smith and telegraphed the appellant from Meridian as follows: "Be in West Point this evening. Lost address." Appellant wired back: "Call on H. Richard Smith, West Point." Appellee called upon Smith, looked over different property, and finally traded with Smith by exchanging his property in Dexter, Mo., for a farm which Smith owned near West Point, Miss., described in the above letter. Afterwards the appellant wrote to Miller inquiring the result of the trip to West Point, saying that if no trade had been made that he would try to find something else, and subsequently wrote Miller demanding a commission of six hundred dollars for services in the matter. To this Miller replied that he was at a loss to understand upon what theory appellant looked to him for a commission, "as the land was not listed on any information furnished you at my request. As Mr. Smith owned the land concerned in his half of the trade it seems to me if you had anything due you in the way of commissions you should look to him for settlement. I talked to Mr. Smith personally and showed him your letter and he said it was not quite plain to him."

The appellant thereupon brought suit, and on the trial introduced Mr. Barr, who testified that the property described in the letter above set out was listed with the appellant by H. Richard Smith, who was a real estate agent at West Point, and that they had an arrangement with each other to divide commissions, but that on the sale of Mr. Smith's property he saved the commission. In other words, the appellant was entitled to no commission from Mr. Smith under their arrangement as to property owned by Mr. Smith which they listed and sold. He further testified that he did not disclose to Mr. Miller the contract and arrangement between H. Richard Smith and the appellant. On this evidence the court sustained the motion of the defendant to strike out the evidence and grant a peremptory instruction which was sustained and judgment duly entered, from which judgment this appeal is prosecuted.

We think the action of the circuit court was correct on the facts in this record. There was nothing to show that Miller knew that appellant was representing both parties, and we think the natural inference from all the circumstances is that Miller understood that the appellant was representing the property owners other than himself, and that he did not understand that the appellant was representing him as his agent. In other words, he was dealing with the appellant as the agent of other persons, and not using the appellant as his agent, and did not know that the appellant was representing both buyer and seller or both parties to the exchange.

There is a difference between a broker and a real estate agent, and we think the appellant, under the facts in this record, was a real estate agent and not a broker. If he is representing both parties, he must disclose to each of the parties his relation to the other.

In 9 Corpus Juris, p. 518, section 20, the following principle is stated:

"Identity of Principal. Primarily a broker employed to do a particular thing is the agent of the party who

first employs him, and he cannot, without the full and free consent of both parties, be the agent of both throughout the transaction; but in so far as he acts strictly as a middleman to bring the parties together or to execute the contract after the parties have agreed on the terms, such as to effect a purchase or sale of property, he is the common agent of both parties. But where the contract is completed, signed, and delivered, the agency of the broker as to both parties ceases, and if it is sought to bind either party by any action of the broker after the execution of the contract, it must be shown that he had authority to act."

Inasmuch as he admits that he did not bring to the attention of Mr. Miller the fact that he was claiming to be agent of both parties, and did not disclose his agency for H. Richard Smith, he was not entitled to recover from the appellee, and the peremptory instruction was properly given.

*Affirmed.*

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SOVEREIGN CAMP, W. O. W. v. GARNER.

[87 South. 458, No. 21216.]

1. INSURANCE. *Fraternal benefit societies not governed by general law as to filing constitution, etc.*

Under chapter 206, Laws 1916, fraternal benefit societies are exempt from the provisions of section 2636, Code 1906 (Hemingway's Code sec. 5102), and the existing requirements in reference to filing with the Insurance Commissioner the constitution, by-laws, rules, and regulations of such societies, and penalties for a failure to so file them, are contained in the provisions of chapter 206, Laws 1916.

**2. INSURANCE.** *Fraternal benefit society's laws are of no force unless filed with Insurance Commissioner.*

Under the provisions of sections 12, 13, and 22 ch. 206, Laws 1916, the constitution, by-laws, rules and regulations, and amendments thereto, of every fraternal benefit society transacting business in this state must be filed with the Insurance Commissioner to give them validity in this state, and if such constitution and by-laws are not so filed, there has been no legal adoption thereof so far as the interests of policy holders in this state might be affected thereby, and they will not avoid or defeat any policy issued by such society in this state.

**3. EVIDENCE.** *When certified copy of law of fraternal benefit order is introduced burden is on other party to show it had not been filed.*

Under section 22, ch. 206, Laws 1916, printed copies of the constitution and laws as amended, changed, or added to, certified by the secretary or corresponding officer of the society, are prima facie evidence of the legal adoption thereof, and when a copy so certified has been introduced in evidence by a defendant society, the burden is on the plaintiff to show that such by-law, rule, or regulation has not been filed with the Insurance Commissioner.

APPEAL from circuit court of Covington county.

HON. W. H. HUGHES, Judge.

Action by Mrs. Floyd Dora Garner against the Sovereign Camp, Woodmen of the World. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. U. Corley, for appellant.

The question submitted by the court is whether section 2636, Code of 1906, which reads: "Every corporation, company, society, organization or association of this or any other state or county, transacting business of life insurance upon the co-operative or assessment plan, shall file with the commissioner of insurance and banking, before commencing to do business in this state, a copy of its charter or articles of association, as well as the by-laws, rules or regulations referred to in its policies or certificates and made a part of said contract. That no by-laws

or regulations, unless so filed with the commissioner, shall operate to avoid or affect any policy or certificate issued by such company or association," is repealed or modified by chapter 206 of the Laws of 1916.

Section 4 of chapter 206, Acts of 1916, answers that question itself, and makes very plain the question submitted. It reads as follows: Exemptions: Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance law of this state, not only in governmental relations with the state, but for all other purposes, and no law hereafter enacted shall apply to them unless they be expressly designated therein.

We submit that the code section is not excepted anywhere in the entire act, therefore the only conclusion that can be reached is that chapter 206 of the Acts of 1916, govern exclusively the appellant in this cause. The title of the act is sufficient alone, if there was no other provision in the act. An act for the regulation and control of fraternal benefit societies. The title of the act alone specifically sets forth the intention of the act, and section 4, specifically states that the act and this act alone shall control both in matters for the state and for all other purposes.

Section 22 of the self-same act provides for the filing of the charter, or by-laws and constitution and amendments thereto, but does not attach the old penalty. Section 4 already referred to, specifically says this act shall control, hence the only conclusion that can be reached, is that chapter 206, Acts of 1916, repeals all insurance laws of the state insofar as societies of this kind are concerned. Therefore citations of counsel for appellee are out of order, wherein he cites 119 Miss. 727; 105 Miss. 750; 104 Miss. 752, etc. They have no application here; also *Mystic Circle v. Turner*, 105 Miss. 468, has no application here, for the reason that the act itself settles the question. It is not a question of implication, or repealing of statutes by implication in this case as matters now stand, because

the act inquired about by this court in section 4 settles and answers the question itself.

*Modern Woodmen v. Coleman*, 94 N. W. 814, is cited by counsel, and the language of the court used only in part, but nowhere in the entire record in this case, can anything be gathered or even implied that appellant has used any astuteness, to find an excuse to keep from paying this claim. On the contrary, it is specifically shown that the insured violated his contract himself, and now that he is dead, his mother, and not his wife is seeking to collect any way.

But counsel argues now that both the Code section and the Act of 1916 are applicable. Not so, and cannot be under any construction that can be applied. The appellant is either under the control of chapter 206 of the Acts of 1916, as an entirety or it is not governed by it at all.

Counsel presents a question new to us; that is that chapter 206 does not embrace this certificate, or the certificate here sued on. In that case all certificates issued before the insurance laws of Mississippi were passed, are not affected by and cannot be affected by any law that the legislature may pass on, has passed. No cases cited by him bear out his contention. It is quite a different thing from passing a law that undertakes to change or impair a contract, and that of passing of a law controlling contracts. No attempt has been made at all to impair appellee's contract, or to change it, and if his argument is to be considered good, then neither chapter 206 or the Code section either can affect the certificate here sued on, it should be void, and the insured agreed to that in writing, and the beneficiary herself admits it. Neither the code section or the chapter 206 either are referred to, or mentioned, yet the state steps in and makes conditions for them, and for the enforcement of their contract, notwithstanding they had made an independent contract of their own.

We submit again that the code section has no place in this trial, but frankly admit that we had overlooked it until attention was called to it by this court. The chap-

ter 206. of the Acts of 1916 govern entirely the appellant and like bodies.

We submit again, that if the Code section does apply, that a very grave injustice was done appellant by the court in taking charge of the case and rendering judgment, before appellant had rested its case.

*E. L. Dent*, for appellee.

Appellee has received a copy of the recent brief of appellant wherein it submits that the code section has no place in this trial, "but frankly admits, it had overlooked it until attention was called to it by this court."

It is to be observed further, however, that appellant has either "overlooked" "or by its silence frankly confesses," that the pertinent authorities cited by the appellee sustained the action of the court below, and maintained the right of appellee to recover.

Appellant cites section 4 of the Acts of 1916: "Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations, with the state, but for every other purpose, and no law hereafter enacted shall apply to them unless they be expressly designated therein."

This section does not, in express terms, refer to section 2636, Code of 1906 (Hemingway's Code, section 5102) and it must be admitted that this section was undoubtedly applicable when this certificate was issued, and was in every respect in force. It was therefore necessary for the appellant to file with the commissioner of insurance, "before commencing to do business, a copy of its charter or articles of association, its by-laws, rules or regulations referred to in its policies or certificates and made a part of said contract," and it was imperative "that no by-laws or regulations, unless so filed with the commissioner shall operate to avoid or affect any policy or certificate issued by such company or association."

The Act of 1916 provides that an organization which shall make provision for the payment of benefits in accordance with section 5 hereof, is hereby declared to be a fraternal benefit society. This act only applies to societies providing for the payment of benefits in accordance with section 5 of the act, but does contain stringent provisions for the issuance of licenses, and for the operation of societies, under the supervision and control of the commissioner of insurance.

Section 6 limits the payment of death benefits to certain designated persons. Section 8 provides how a certificate should be issued and what it should contain, and does not, we respectfully submit, apply in any manner to certificates issued prior to the passage of said act. Section 22, we respectfully submit, applies to duly certified copies of amendments, or additions to the constitution and laws and that printed copies, and not typewritten copies, duly certified to by the secretary or corresponding officer of the society, shall be *prima-facie* evidence of the legal adoption thereof. This clause authorized the filing of printed copies duly certified to by the commissioner of insurance, and does not, we submit, provide for the introduction of these amendments at a trial, without some evidence of filing with the commissioner.

The Act of 1916, prescribes an elaborate system for the government of these fraternal organizations and exempts them from certain provisions of the insurance laws of the state, which also provides for the inspection and supervision of insurance companies by the commissioner; and we therefore contended that the provision that no laws or regulations, unless filed with the commissioner, shall operate to avoid or affect any policy or certificate issued by such company or association, is not impaired by, or in conflict with, any of the provisions of the Act of 1916.

These organizations must file their constitutions, by-laws, and amendments, thereto, with the commissioner of insurance. They may file printed copies of amendments or additions when duly certified to by the proper officer,

and unless there is some proof that it has been so filed, as required by section 2636 (Hemingway's Code, section 5102), they should not, for the reasons already stated, be permitted to be introduced in evidence.

The exemption of these fraternal societies from the provisions of the insurance laws of the state, not only in governmental relations with the state, but for every other purpose, was clearly intended to regulate and control all societies endeavoring to do business in the state after its passage, and to permit organizations transacting business in the state prior to its passage to continue to operate; but, we submit, did not exempt them from the enforcement of a rule of evidence that when the amendments of the constitution and by-laws are sought to be introduced, some proof should be furnished that they have been filed, and, as stated, there is no requirements in the Act of 1916, which is repugnant to the provision that, the by-laws or regulations must be filed with the commissioner of insurance or annuls the authority of *Mystic Circle v. Turner*, 105 Miss. 48.

We therefore respectfully submit that this cause should be affirmed.

W. H. Cook, J., delivered the opinion of the court.

Appellee instituted this suit against the Sovereign Camp of the Woodmen of the World to recover on a policy of insurance issued for her benefit to her son, William A. Garner, now deceased, and from a judgment for appellee this appeal was prosecuted.

To the declaration filed in this cause, appellant filed its plea of the general issue, and also filed a special plea averring that—

“The insured violated section 43 of the constitution and by-laws of the Sovereign Camp of Woodmen of the World, in that he changed his occupation from an unhazardous to a hazardous employment by becoming an employee in an electric current generating plant, which said employ-

ment began in June, 1918, and said insured wholly failed to give notice within thirty days of his change of occupation and wholly failed to pay his monthly installment of thirty cents per thousand as required by paragraph (b), section 43, of the constitution and by-laws of the Sovereign Camp of the Woodmen of the World, whereby he became suspended and his beneficiary certificate became null and void long prior to his alleged death in November."

To this special plea appellee filed a replication, denying that the insured had violated section 43 of the constitution and by-laws of appellant society, or that the insured had changed his occupation from an unhazardous to a hazardous employment by becoming an employee of an electric current generating plant, or that said insured had wholly failed to give notice within thirty days of his change of occupation or to pay his monthly installment of thirty cents per thousand as required by paragraph (b), section 43, of the constitution and by-laws of the Sovereign Camp, Woodmen of the World, whereby he became suspended and his beneficiary certificate became null and void prior to his death; but charged the fact to be that the insured died of Spanish influenza and pneumonia, and that his former occupation had not contributed in any way to the death of insured.

By agreement of counsel the cause was submitted to the court, without the intervention of a jury, to abide the action and judgment of the court upon the special plea, under certain evidence introduced by the parties and the following agreed statement of facts:

"That Willie A. Garner, the insured in policy sued on, was admitted to membership of the Sovereign Camp of the Woodmen of the World, and a policy issued to him, dated May 24, 1904, at which time he was working as an employe of a lumber manufacturing concern, principally in a planing mill; that he continued to so work until in June, 1918, when he left the employment of said lumber manufacturing concern and entered the employment of the Hattiesburg Traction Company of Hattiesburg, Miss.,

and remained in their employ until the illness that caused his death; that the Hattiesburg Traction Company is a corporation incorporated under the laws of the state of Mississippi, and is engaged in the operation of street car lines and street cars propelled by electric current, and street lights, electric lights for domestic and general business use, and to this end generates its electric currents; that in the month of June, 1918, the insured, Willie A. Garner, became an employee in the generating plant of the said Hattiesburg Traction Company, so engaged as an electric generating plant, and was employed as an oiler; that his duty as such oiler was to see that all bearings in said plant were properly lubricated, the engine rooms properly swept and cleaned, and that all idle machines were wiped and cleaned; that his position as such oiler was subordinate to that of the engineer, and that he continued to occupy this position until the 18th day of December, 1918, when he was stricken down with Spanish influenza, from which developed pneumonia, from which he died December 28, 1918, and that his occupation did not cause his death; that the deceased was a member of the Ora Camp at Ora, Miss., and gave no notice to the clerk of said camp of his change of occupation, and did not pay the the sum of thirty cents per month on each one thousand dollars of insurance carried, and that the clerk of said camp would so testify; that the deposition of Sovereign Clerk John T. Yates is hereto attached, and agreed that same may be a part of this record, subject to objection for competency and relevancy only; that the copy of the policy attached to plaintiff's declaration is a true copy of the policy issued to deceased, and that the plaintiff, Mrs. Floyd Dora Garner, is the beneficiary mentioned in said policy, and that she is of legal age; that proof of death was duly and formally made by said beneficiary, all of which is attached to this agreement, made a part hereof, and included in this agreement; that suit was filed by said beneficiary under date of June 4, 1919, and defendant hath pleaded thereto, relying on sections

43 and 70 of the by-laws and constitution of said defendant as a defense thereto."

The deposition of John T. Yates, Sovereign Clerk and *ex-officio* secretary of appellant society, was offered in evidence, and there was attached thereto as an exhibit a printed copy of the constitution and by-laws of the society, certified by the witness as being a true, perfect, and compared copy, and section 43 of these by-laws contains the following stipulation:

"If any member engage in the occupation or business of employee in an electric current generating plant, he shall within thirty days notify the clerk of his camp of such change, and while so engaged in such occupation, he shall pay on each monthly assessment or installment thirty cents for each one thousand dollars of his beneficiary certificate in addition to his regular rate, and any member failing to notify the clerk and make such payments as above provided shall stand suspended and his beneficiary certificate be null and void."

Appellee objected to the introduction of the constitution, rules, by-laws, or regulations of the appellant society for the reason that appellant had not shown that it had complied with section 2636, Code of 1906 (Hemingway's Code, section 5102), by filing with the State Insurance Commissioner a copy of such constitution and by-laws. This objection was sustained by the court, and thereupon appellant requested an adjournment until the following morning, it being then seven o'clock p. m., to enable it to introduce the Insurance Commissioner to make this proof. This motion for an adjournment was overruled, and judgment was entered in favor of appellee for one thousand dollars.

The first question presented for decision is whether section 2636, Code of 1906 (Hemingway's Code, section 5102), providing that no by-laws or regulations shall operate to avoid or affect any policy unless filed with the Insurance Commissioner, has been repealed or in any way modified by chapter 206, Laws of 1916, regulating fraternal bene-

fit societies operating on the lodge system and having a representative form of government.

By chapter 206, Laws of 1916, the legislature has provided a complete scheme for the organization and government of fraternal benefit societies organized in this state, and for the government and control of such foreign societies or companies as were already doing business in this state at the time of the adoption of this chapter, or which might thereafter be admitted to do business in this state. Section 4 of this chapter provides:

“Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein.”

This section expressly exempts fraternal benefit societies from the operation of section 2636, Code of 1906 (section 5102, Hemingway's Code), unless there is some provision of the act of 1916 which prevents the exemption thereof from applying to this Code section, and we find no provision in chapter 206 which takes this Code section out of the exemption; but, on the contrary, when all the provisions of the chapter are considered together it appears that it was intended to substitute for this section of the Code a different scheme for the accomplishment of the purpose sought to be guaranteed under the provisions of the Code section. We conclude therefore that under section 4 of chapter 206, Laws of 1916, fraternal benefit societies are exempt from the provisions of section 2636, Code of 1906 (Hemingway's Code, section 5102), and that we must look to the provision of the act of 1916 alone to find the existing requirements in reference to the duty of filing with the Insurance Commissioner the constitution, rules, by-laws, and regulations of such societies, and also the penalty for a failure to so file them.

What, then, are the requirements of chapter 206, Laws of 1916, in reference to filing with the Insurance Com-

missioner copies of the constitution and by-laws of such societies? The act provides for the organization and incorporation of fraternal benefit societies within the state, and also provides the terms and conditions upon which societies already organized and doing business in the state may continue.

Section 12 of the act, after providing how a fraternal benefit society, as defined by the act, may be organized and secure articles of incorporation in this state, contains a further provision, as follows:

"Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor and circulars to be issued by such society, and bond in the sum of five thousand dollars, with sureties approved by the Insurance Commissioner, conditioned upon the return of the advanced payments, as provided in this section, to applicants, if the organization is not complete within one year, shall be filed with the Insurance Commissioner, who may require such other information as he deems necessary, and if the purposes of the society conform to the requirements of this act, and all provisions of law have been complied with, the Insurance Commissioner shall so certify and retain and record, or file, the articles of incorporation, and furnish the incorporators a preliminary certificate authorizing said society to solicit members."

Under the provisions of the insurance laws which were in force at the time of, and prior to, the adoption of the Act of 1916, every fraternal benefit society or company was required to file with the Insurance Commissioner a copy of its constitution, by-laws, rules, and regulations before it was permitted to transact business in this state, and no rule or regulation had any validity here unless so filed, and this Act of 1916 provided that any such society that was lawfully engaged in transacting business in the state at the time of the passage of the act might continue to exercise the rights, powers, and privileges then exer-

cised or possessed by it under its articles of incorporation. Such a society possessed no rights or privileges in this state until its constitution and laws were filed here, and the constitution and by-laws of such society being already on file with the Insurance Commissioner, it was only required that it should file any amendments which might be adopted from time to time if it desired to continue to transact business in this state; this provision of the act being found in section 13 thereof, which reads.

“Any society now engaged in transacting any business in this state may exercise, after the passage of this act, all of the rights conferred thereby, and all of the rights, powers and privileges now exercised or possessed by it under its charter or articles of incorporation not inconsistent with this act, if incorporated; or, if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided therein or in its constitution and laws; and all such amendments shall be filed with the Insurance Commissioner, and shall become operative upon such filing, unless a later time be provided in such amendments or in its articles of incorporation, constitution or laws.”

Section 22 of the act requires that every such society transacting business in this state shall file with the Insurance Commissioner all amendments or additions to its constitution and laws; this section being as follows.

“Every society transacting business under this act shall file with the Insurance Commissioner a duly certified copy of all amendments or of additions to its constitution and laws within ninety days after the enactment of the same. Printed copies of the constitution and laws as amended, changed or added to, certified by the secretary or corresponding officer of the society, shall be *prima-facie* evidence of the legal adoption thereof.”

It will thus be seen that sections 12, 13, and 22 of chapter 206, Laws of 1916, require that the constitution, by-

laws, rules, and regulations, and amendments thereto, of all such societies transacting business in this state, whether they were admitted to transact business here prior to the adoption of the act, or were organized and incorporated under its provisions, must be filed with the Insurance Commissioner to give such constitution and laws validity in this state. If such by-laws, rules, and regulations, and amendments thereto, are not in fact on file with the Commissioner, there has been no legal adoption thereof so far as the interests of the policy-holders in this state might be affected thereby, and they have no life or validity here, and will not avoid or defeat any policy issued by such company or society in this state.

It remains, then, to consider the effect of the provisions of said chapter 206 upon the kind and character of evidence now required to show the legal adoption of the constitution and by-laws of any such society. Section 22 of the act provides that printed copies of the constitution and laws as amended, changed, or added to, certified by the secretary or corresponding officer of the society, shall be *prima-facie* evidence of the legal adoption thereof. Under this provision the society may introduce such a certified copy, and this shall be sufficient evidence of the legal adoption thereof, which in the purview of this statute includes filing, unless this *prima-facie* evidence is rebutted. In the instant case the appellant introduced the evidence required under this section to show *prima-facie* the legal adoption of the by-law, and the burden was thereby shifted to appellee to overcome this *prima-facie* evidence if, in fact, the by-law had not been filed and legally adopted in this state. Upon a new trial the pleadings may be amended so as to properly submit this issue.

In the final brief filed by counsel for appellee the contention is made that the appellant has waived any alleged forfeiture, but the question of a waiver was not raised in the pleadings, and the testimony upon which the argument is based is not fully developed in this record.

The judgment of the court below is reversed, and the cause remanded.

*Reversed and remanded.*

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RIDGEWAY *et al.* v. JONES.

[87 South. 461, No. 21366.]

1. EXECUTORS AND ADMINISTRATORS. *Statutory requirement that executor file vouchers for disbursements for annual accounts mandatory.*

Section 2121, Code 1906 (Hemingway's Code, sec. 1789), making it the duty of an executor to produce and file with his annual accounts vouchers for disbursements made, is mandatory, and it is not within the discretion of the chancellor to dispense at will with this requirement of the statute.

2. EXECUTORS AND ADMINISTRATOR. *Executor may file duplicate of lost vouchers for disbursements.*

Since the vouchers which executors are required to file with their annual accounts are mere receipts for money paid out, there is nothing in the object or purpose sought to be accomplished by their production, or in the nature of the voucher itself which forbids the duplication or substitution of a lost voucher.

3. EXECUTORS AND ADMINISTRATORS. *Executor may not pay claims not probated and allowed.*

An executor has no authority to pay claims against the estate of a decedent which have not been probated and allowed, and he should not be allowed credit for claims so paid.

4. EXECUTORS AND ADMINISTRATOR. *Expenditures for funeral expenses and monument may be allowed if not excessive.*

The reasonableness of expenditures made by the executor for funeral expenses and monument for the deceased testator is a matter which is addressed to the sound judgment and discretion of the chancellor, and an executor may be allowed credit for such expenditures if in the opinion of the chancellor the same are not excessive.

APPEAL from chancery court of Bolivar county.

HON. G. E. WILLIAMS, Chancellor.

Suit by Mollie Roach Ridgeway and others against F. J. Jones, executor of the last will and testament of Samuel Jones, deceased, to contest the executor's first annual account. Decree for respondent, and complainants appeal. Reversed and remanded.

See, also, 84 So. 692.

*Summerville & Summerville and Dabney & Dabney*, for appellant.

So far from the estate being indebted to this executor in the sum of ninety-eight dollars and ninety-nine cents, as stated in the decree of the chancellor, the executor appears indebted to the estate in the sum of one thousand seven hundred three dollars and eleven cents.

It is true some of the items of expense incurred and for which the chancellor allowed this executor credit were on account of the last illness and funeral expenses, etc., of decedent. The item of thirty-two dollars and sixty cents for S. H. Harris "medical attention" was certainly a debt that should have been probated as the law requires (See *Hilderbrand v. Kinney*, 87 N. E. 832) and not having been probated should be charged back to the executor.

The other items: Embalmer Brown, \$50; Casket, \$375; Tombstone, \$290, even if not excessive in the eyes of our law, while maybe not required to be probated, should certainly be supported by vouchers as the law requires, and not being supported by vouchers, should not have been allowed by the court.

We can hardly believe that this honorable court will endorse the conduct of the chancellor in allowing these claims on the mere say-so of this negro executor unsupported by any receipts or vouchers. Even were the payments of the item of casket three hundred seventy-five dollars and tombstone two hundred ninety dollars regular, so far as the same being supported by vouchers was con-

cerned, which is not the case, the charges were grossly excessive and should not have been allowed at any such sum as charged. True, the executor testified on page 50 that he had the sanction of the other heirs to make these expenditures and we had no way to dispute it. Still there is nothing to support the credits for these amounts in the executor's accounts and they should not have been allowed.

In conclusion we have only to say that this estate has been handled in a most haphazard manner.

Our law required at the time Jones was appointed executor of this estate that claims should be registered and probated and allowed in the court in which the letters testamentary were granted within a year after the first publication of notice to creditors, otherwise the claims would be barred (See sec. 1775, Hemingway's Code); and in the case of executor's accounts, section 1789 provides positively that every item and the amount thereof "Shall be distinctly stated, supported by legal voucher," etc., and further, that the account must be sworn to.

*Roberts & Hallam, for appellee.*

The agreement about the funeral expenses, tombstone, etc., and the agreement as to the division of the personal property having taken place both before and shortly after the funeral and before the assignment to Messrs. Dabney & Dabney was filed on July 31, 1917, the said Mollie Roach and her assignees who prosecute this appeal in her name for their benefit are estopped to now rue back. Mollie could not induce the executor to make these payments, and then after he had made them, contest their allowance. Nor can her assignees, having undisputedly received her part of the personal property, Mollie could certainly not charge the administrator therewith under any circumstances without offering to return the property she received. In other words Mollie does not come into equity with clean hands, nor does she offer to do equity, and the court will bear in mind that this petition contesting the executor's account

was not originally filed in the name of Mollie for the benefit of the assignees, but was filed by Mollie individually and for Mollie's own personal benefit. Having entered into the arrangement for the burial of the old man, and having become a party to the division of the personal property, Mollie, and those claiming under her, is estopped.

One may as a result of his acts or agreements be estopped to make objections to or to contest the account of a personal representative." 18 Cyc., 1173.

The point is, for the first time, made in this court that the expenses of the last sickness, embalming, tombstone, casket, etc., were not supported in the court below by proper vouchers, and for this reason it is contended that this court should disallow these items, irrespective of the agreement of Mollie Ridgway. The court will observe that the only objection to these items in the court below was that they were not probated claims.

Having elected to stand on one ground of objection in the court below, appellants cannot now set up a wholly different ground. Having tied themselves, they must remain bound, even though these items had not been supported by proper vouchers. But they were. The uncontradicted evidence shows that the vouchers were taken by the executor and afterwards by him delivered to his attorney to prepare his account, and that they were misplaced and could not be found by the attorney.

Although the statute makes it the duty of the executor to obtain vouchers, it does not provide that he shall not be allowed credit for disbursements which are not so supported. This is a matter which lies in the discretion of the chancellor. Any evidence which satisfies the chancellor is sufficient. In the case at bar, however, the executor performed his duty by obtaining proper vouchers. This is the uncontradicted evidence.

We therefore insist that this appeal is without merit; that all of the evidence introduced in the court below sustains the account of the executor and the decree rendered

thereon, and that the decree appealed from should be affirmed.

WILLIAM H. COOK, J., delivered the opinion of the court.

This is an appeal from a decree of the chancery court of Bolivar county, approving the first annual account of Frank Jones, executor of the last will and testament of Samuel Jones, deceased. It appears that Samuel Jones died testate, leaving as his heirs four children, among whom was the complainant, Mollie Roach Ridgeway, and that under the terms of the will all the property, real and personal, of decedent was devised to these four children in equal shares, and appellee, a son of decedent, was named executor of the will without bond. Appellee duly qualified, and entered upon the discharge of his duties as executor, and notice to creditors to probate and register their claims was published. An appraisement of the personal property was made, and on April 9, 1917, the report of the appraisers was filed, and this appraisement showed a total valuation of the personal property to be one thousand forty dollars and twenty-five cents, while property of the value of four hundred thirty dollars was set aside to the heirs as exempt. On September 11, 1917, the executor filed an inventory showing that one thousand fifteen dollars additional had come into his hands.

Complainant, Mollie Roach Ridgeway, having become dissatisfied with the administration of the affairs of the estate, employed Messrs. Dabney & Dabney and Somerville & Sommerville, attorneys, to represent her in the settlement of the estate, and as compensation for their services she executed to them an assignment of a one-third interest in her share of the personal property and a half interest in her share of the real estate devised to her by her father.

After the filing of the inventory on September 11, 1917, nothing further appears to have been done in the admin-

istration of the estate until June 9, 1919, when, at the instance of complainant's attorneys, a citation was issued to the executor, requiring him to file an account of his administration of the estate on or before the 1st Monday in July, 1919, and on the 1st day of the following October an account was filed by the executor. This account was not supported by any vouchers, but the executor attached thereto his affidavit that vouchers for the various items of expenditures shown on the account had been delivered to his attorney and lost.

On October 2, 1919, complainant, through her attorneys, filed a petition, contesting the account filed by the executor, and praying for an order requiring the executor to pay over to complainant her distributive share of the estate. This petition did not come on for hearing until the following February, and in the meantime it appears that complainant, without the knowledge and consent of her attorneys, made a settlement with the executor, and for a recited consideration of three hundred dollars she executed a deed conveying to the executor all her right, title, and interest in all the real and personal property belonging to the estate of Samuel Jones deceased, and therefore, at the hearing of this petition and contest the testimony of this complainant was not available. Upon the hearing of this contest the testimony of several witnesses, including the executor, was heard, and the court dismissed the contest and entered a decree approving the account with the exception of one item, and from this decree Dabney & Dabney and Somerville & Somerville, assignees, for themselves prayed for and were granted an appeal to this court.

After the case reached this court on appeal appellee filed a motion to dismiss the appeal, and on the hearing of this motion the right of these attorneys to prosecute this appeal was upheld in an opinion by Chief Justice Smith, which may be found reported in 84 So. 692.

We think the decree approving this executor's account as filed was erroneous, and, since this cause must be re-

versed, we will undertake to state our views in regard to the various items of debit and credit in order that an account may be prepared and a decree entered in accord therewith.

It appears from the evidence offered on the hearing of the former contest that the executor took possession of all the property covered by the report of the appraisers, including the exempt property, amounting to one thousand forty dollars and twenty-five cents; that a bale of cotton included in this appraisalment was sold for an excess of seventy-seven dollars and eighty-two cents over the appraised value; that the executor collected the sum of one hundred sixty-nine dollars and seventy-three cents on a promissory note which was not included in the appraisalment or the additional inventory filed by the executor; and that there also came into the hands of the executor the additional sum of one thousand fifteen dollars, as shown by the inventory filed September 11, 1917. The executor should be charged with these various amounts, making in the aggregate the sum of two thousand three hundred three dollars and forty cents.

On the hearing of the former contest there was some evidence that, prior to the assignment to these appellants of an interest in said estate, all the personal property included in the appraisalment, except the bale of cotton, had been ratably distributed among the four legatees, and, if such be the case, the executor may be allowed credit for these disbursements upon the production of proper vouchers therefor from the legatees.

It appears from the record that only one claim has been probated against the estate, and this item, amounting to two hundred sixty dollars and forty-seven cents may be allowed upon filing voucher therefor. In the administration of the estate certain expenditures were made which are proper charges against the estate, and which may be allowed upon the presentation of vouchers, those items being as follows: ninety-two dollars and thirty-eight cents for taxes, twenty-five dollars for attorney's fees, twenty-

four dollars for appraiser's fees, and four dollars ninety-one cents for advertising notice to creditors. It also appears that at the time of the death of testator the real estate was under mortgage, and that, in order to save the real estate from sale thereunder, the executor paid the sum of one hundred eighty dollars as interest on this indebtedness, and upon production of vouchers for this expenditure he may be allowed credit therefor.

There appears on the account filed by the executor an item of thirty-two dollars and sixty cents for medical attention to the testator during his lifetime, and also an item of two hundred ninety dollars and seventy-four cents due by decedent for lumber. Neither of these items was probated, and as the time for probaton of claims has long since expired, these claims must be disallowed.

The account filed by the executor shows expenditures for funeral expenses and tombstone amounting to the sum of seven hundred fifteen dollars. This expenditure is attacked by the appellants as being unreasonable and excessive, but the reasonableness of these funeral expenses is a matter which is addressed to the judgment and discretion of the chancellor, and if, upon investigation, the chancellor is of the opinion that this expenditure is not excessive, these items may be allowed when proper vouchers therefor are produced and filed.

The record discloses the fact that the executor collected three hundred fifty dollars as rent of the lands of decedent's estate, and appellants contend that this sum should be charged against the executor on his annual account. There was some contention in the court below that this real estate had been rented by the executor under an order of the court, but the evidence introduced at the former hearing shows that no such order was made, and that no rent was collected by the executor until the third year after the death of testator, and we approve the action of the chancellor in declining to charge this rent to the executor.

Finally, it is contended by appellee that, while the statute makes it the duty of an executor to obtain vouchers, it does not provide that he shall not be allowed credit for disbursements which are not so supported, and that the requirement that vouchers be produced is a matter which lies wholly in the discretion of the chancellor, and that any evidence which satisfies the chancellor is sufficient. The statute, however, is not so written. The requirement that annual accounts of the executors and administrators shall be supported by vouchers is found in section 2121, Code of 1906 (Hemingway's Code, section 1789), and is as follows:

"Every executor or administrator, at least once in each year, or oftener if required by the court, shall present, under oath, an account of his administration, showing the disbursements; every item of which and the amount thereof shall be distinctly stated, supported by legal voucher, and it shall also show the receipts of money, and from what sources. . . . The court shall examine all such accounts and the vouchers, and if satisfied that the account is just and true, it shall decree the same approved and allowed as a correct annual settlement."

Section 2122, Code of 1906 (Hemingway's Code, section 1790), provides the form in which the vouchers must be prepared, and provides that they shall be filed by the clerk and thereby they become a part of the record of the administration of the estate and are preserved for the inspection of any one interested therein.

The meaning of these sections is not uncertain, the language is plain and mandatory, and the object sought to be accomplished thereby is a wise and reasonable one. Compliance with the requirement that vouchers shall be produced does not lie wholly in the discretion of the chancellor, and if circumstances may arise which would justify the acceptance of other evidence of the correctness of disbursements shown on an account, such evidence must be produced under well-recognized rules.

A voucher is a mere receipt for money paid, and there is nothing in the object or purpose sought to be accomplished by their production, or in the nature of the document itself, which forbids the duplication or substitution of a lost voucher. There is nothing in this record to indicate that it is difficult or impossible, or that any effort has been made, to procure duplicate or substitute vouchers. It may be that a voucher or vouchers may be lost under circumstances which render it impossible to secure a duplication or substitution thereof, and that when this fact is sufficiently shown secondary evidence of the contents of the lost vouchers may be received, but no such case was made in this record, and that question is not here presented.

The decree of the court below will be reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

*Reversed and remanded.*

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CITY OF CORINTH *et al.* v. ROBERTSON, STATE REVENUE  
AGENT, TO USE OF ALCORN COUNTY CHICKASAW  
SCHOOL FUND.

[87 South. 464, No. 21383.]

1. PUBLIC LANDS. *State held to have acquired school sections only upon survey and extinguishment of Indian rights,*

The state of Mississippi acquired the right to the sections No. 16 granted to it for the use of schools by the Act of Congress of March 3, 1803, when, but not until, the right of occupancy of the Indian tribes was extinguished and the sections had been surveyed as provided by law.

2. PUBLIC LANDS. *Federal act held controlling as to terms of trust of school lands in Chickasaw Cession.*

The terms of the trust upon which the land was granted to the state by the federal government for the use of schools in the

Chickasaw Cession must be gathered from the Act of Congress of July 4, 1836, by which the grant was made.

3. PUBLIC LANDS. *Act granting land to state for schools in Chickasaw Cession held not to require use for schools in particular township.*

The Act of Congress of July 4, 1836, by which land was granted to the state for the use of schools in the Chickasaw Cession, does not require any part of the land, its proceeds, or the interest thereon, to be used for schools in any particular township.

4. PUBLIC LANDS. *Congressional act authorizing state to sell land reserved for schools does not affect trust under which state holds lands in Chickasaw Cession.*

The Act of Congress of May 19, 1852, authorizing the state to sell the land reserved for the use of schools, has no effect upon the terms of the trust under which the state held the lands granted to it for the use of schools in the Chickasaw Cession.

5. PUBLIC LANDS. *Upon vesting of title to school lands in Chickasaw Cession, state has full power of disposal.*

After the title of the state to the land granted to it by the Act of Congress of July 4, 1836, for the use of schools in the Chickasaw Cession had vested, the state had full power to dispose of the land without the consent of Congress, and it was also beyond the power of Congress to change the terms of the grant.

6. SCHOOLS AND SCHOOL DISTRICTS. *State agent administering trust fund for educational purpose under state law not personally liable to cestui que trust for diversion resulting from compliance with law.*

When the agent or officer of a state charged by its laws with the duty of administering a fund held in trust by the state for educational purposes, administers it in accordance with the laws passed by the Legislature of the state for that purpose, he is not personally liable to the cestui que trust for any diversion of the trust fund which may result because of his having disposed of it as he was directed by law so to do.

7. SCHOOLS AND SCHOOL DISTRICTS. *Neither municipal treasurer nor district liable for diversion of interest on Chickasaw school fund where administered according to law.*

The treasurer of a municipality constituting a separate school district in receiving and disbursing the interest on the Chickasaw school fund apportioned to the separate school district under the laws of the state for the maintenance of its public

125 Miss.]

Brief for Appellant.

schools acts as the state's agent, and if he complies with the law in making the disbursement, neither he nor the municipality can be held liable for any diversion of such interest from the use for which the fund is held by the state, which may thereby result from the method adopted by the state for administering the trust.

APPEAL from chancery court of Alcorn county.

HON. A. J. MCINTYRE, Chancellor.

Suit by Stokes V. Robertson, State Revenue Agent, to the use of Alcorn County Chickasaw School Fund, against the city of Corinth and another. A demurrer to the bill was overruled, and defendants appeal. Reversed, demurrer sustained, and cause dismissed.

*J. M. Boone and W. H. Kier*, for appellant.

Complainant makes exhibit to his bill chapter 335 of the Act of Congress of 1836, approved July 4, 1836. The second section of that act is the only part of said act that bears upon the controversy in this case. Inasmuch as all of the land in the territory ceded by the Chickasaws had been sold, this Act of Congress of 1836, provided in the second section thereof that there should be reserved from sale in the state of Mississippi a quantity of land equal to one thirty-sixth part of the lands ceded by the said Chickasaws aforesaid out of any public lands remaining unsold contiguous to the said lands within said state so ceded by the Chickasaws:

"Which lands when so selected as aforesaid, the same shall vest in the state of Mississippi for the use of said territory in said state so ceded as aforesaid by the Chickasaws; and said lands, thus selected, shall be holden by the same tenure and upon the same terms and conditions, in all respects, as the said state now holds the lands heretofore reserved for the use of school in said state." Complainant's contention is that the same construction ought to be put upon this act as is expressly provided in the Acts of Congress relative to the 16th sections.

125 Miss.—3

We contend that this is an impossibility. The law with reference to the sixteenth section provides that the funds arising from the said sixteenth section shall be used within the township in which said sixteenth section is situated. But, it is impossible for this rule to apply with reference to the Chickasaw territory, as the land provided for in said Act of Congress above did not lie in any township or in any county in the Chickasaw territory and therefore the law with reference to the sixteenth section fund could not be applied.

Appellee, in the court below, as we understood him, bases his whole contention upon the last clause in said section 2 of the Act of Congress of 1836; which is in this language: "The said lands thus selected shall be holden by the same tenure and upon the same terms and conditions, in all respects, as the said state now holds the lands heretofore reserved for the use of schools in said state." It will be observed that the above clause has nothing whatever to do with the distribution of the money arising from the sale of said lands. It simply has reference to the land itself; that the land shall be held by the same tenure, terms and conditions, but not that the distribution of the funds arising from said lands should be distributed otherwise than for the use of the schools within the territory. As to how it should be distributed among the different schools in said territory is left entirely with the legislature of the state of Mississippi. The only thing the schools of the Chickasaw territory was interested in, was that they should receive one thirty-sixth part of the money arising from said lands selected in lieu of the sixteenth sections in the Chickasaw territory. It is true the land must be held just like all other land ceded to the state for school purposes should be held, same tenure, same conditions, same terms; that is to say by the same title and for the same use and purposes, no more no less.

The state of Mississippi assumed this trust of handling this Chickasaw fund arising from the lands selected and has from the beginning shown that this fund was not un-

derstood to be distributed as a township fund as a unit rather than the county as a unit.

Chapter 3, Acts of 1848, of the legislature of Mississippi, made provision for the disposal of the lands ceded by the Act of Congress for the use of schools in the Chickasaw cession, in lieu of the sixteenth sections of said cession, and in the fifth section of said act it is provided that the auditor of public accounts should open an account between the state of Mississippi and the fund realized from the lease of lands in a book to be kept for that purpose, in which he should charge the state with the amount received on account of said lands, and the whole amount of said money, after deducting expenses, to be held in trust by said state for the use of schools in the Chickasaw cession and to be applied for that purpose as hereafter to be provided by law.

Chapter 27 of the act approved March 12, 1856, Acts of 1856-57-61, page 81, provides in the first section thereof that the *pro rata* share of the net proceeds of the Chickasaw school lands to which the counties therein named, including Tishomingo county, which at that time covered the territory which is now called Alcorn county, together with all monies arising from other sources, such as fines, forfeitures, etc., and all other school funds belonging to said counties or which may hereafter be created for them by any law, should constitute the school fund for the same, and section 8 of said act provided: "That nothing herein contained shall be so construed as to prevent said commissioners, after providing for all proper beneficiaries, from expending the whole of the remaining current interest from time to time as equally as may be between all the schools applying for aid." This demonstrates that the funds arising from the Chickasaw lands were appropriated to counties, as counties, independent of the question of township.

It will be observed from the quotation of the Act of 1848, above, that it was provided that the funds arising from this land should be applied as hereafter to be provided by

law; and now, to put at rest how it should be applied as above provided, we find in chapter 56 of the Acts of 1856-61, pages 141-142, and in the third section of said act, the following:

"That the secretary of state is hereby required to make out and furnish to the auditor of public accounts a calculation, based on the area of territory in the Chickasaw purchase, of the proportionate amount of interest due to each of said counties; and it is hereby made the duty of said auditor to issue his warrant on the state treasury for said proportionate amount, upon application by him to said county treasurer."

It is perfectly clear from this act that the county was selected as a unit of distribution and not a township. Each county was to receive the same proportion of the money that the area of said county bore to the area of territory in the Chickasaw purchase. That is the way this fund has ever since been handled.

Complainant attaches the Laws of 1858, approved December 2, 1858, page 121, as an exhibit to his bill. By reference to said act it will be observed that the township feature is recognized, but that act, by section 5 thereof, applies only to Itawamba county and can have no possible bearing upon any other county in Chickasaw territory.

Chapter 11, Laws of 1873, page 17, expressly declares said Chickasaw school fund should be expended annually in the maintenance of the public school system in the several counties entitled to the same.

In chapter 9, Acts of 1878, section 1, provides: "that hereafter the interest arising from the Chickasaw school fund shall be paid by the treasurers of the several counties entitled thereto upon the school warrants issued for the services rendered during the year, that said interest is distributed to the several counties, and shall be paid out in the same manner as now provided by law for expending the common school fund."

All these foregoing acts clearly and unmistakably deal with the county as a unit and not with the townships

therein. I find no act subsequent to 1878 dealing with the Chickasaw school fund, save only that each legislature appropriates the interest due on the Chickasaw school funds out of the state treasury, and this appropriation each year has been sent to the counties as provided in the acts hereinabove referred to; to be used as a common school fund in the county as a unit and not the township; that is, divided between the several separate school districts according to the number of educable children in said districts and territories. This has been the custom continuously, at least as far back as 1880. This handling of this fund, as set forth in the above acts, has been uniform, public and notorious, known by Congress, and no complaint has ever been made by Congress as to the handling of this fund by using the county as a unit instead of the township; and we think the language of this court in the case of *Connell, et al. v. Woodard et al.*, 5 Howard, 672, is appropriate.

Appellee's contention rests altogether upon implication. They base the claim upon the facts that inasmuch as the sixteenth section was one-thirty-sixth of a township, that by implication the same rule should apply to the Chickasaw fund, inasmuch as it was provided that one-thirty-sixth of the money arising from sale of lands in lieu of the sixteenth section should be devoted to school purposes in the Chickasaw territory.

The rule of distribution of the sixteenth section to each township was not a rule of necessity, but purely an arbitrary rule. Now, to give the Chickasaw fund this interpretation by implication, there must be a necessity therefor in order to carry out the real purpose of the act. Only those things are implied in the construction of an act as are necessary to carry out the full purpose of the act. The county could be adopted as a unit in either case as well as a township. The object of the grant could be accomplished just as well by one unit as by the other, and the adoption therefore of one method in one act does not involve or control in the other act. The real object and

purpose of this reservation of land was for the education of the youth of the land and could be equitably subversed under the one system as well as under the other. It is therefore unnecessary to imply anything in the act with reference to the Chickasaw fund, and if this court should put that construction upon the laws with reference to the Chickasaw territory fund by implication, it would be legislating something into the statute rather than construing the statute.

Appellee attaches to his original bill chapter Acts of Congress of 1852, United States Statute at Large, Vol. 10, page 6. This act of the Congress ratified and approved the sales of land made by the state of Mississippi prior thereto. The first section thereof provides for the sale or lease of all or any part of the lands reserved and appropriated by Congress for the use of schools within the state of Mississippi, and to invest the money arising from the sale as the said legislature may elect, for the use and support of the schools within the several townships and districts of the county for which they are originally reserved and set apart, and for no other use or purpose whatsoever; provided said lands or any part thereof shall in no case be sold or leased without the consent of the inhabitants of said township or district, to be obtained in such manner as the legislature of said state may by law direct; and provided further, that in all cases the money arising from the sales of land within a particular township and district shall be appropriated for the use of schools within the township and district.

If this act of Congress has any bearing whatever upon the issue involved in this case, then it appears clearly that the Congress had in mind the situation as it existed at that time in Mississippi, namely, that all that territory in Mississippi ceded to the state by the Chickasaw Indians had been sold and there could not be a reservation of the sixteenth section in said territory or "district of county" and that, therefore the Congress provided that the money should be for use in the several townships and

"districts of county" for which they are originally reserved. We think that "district of county" in said act referred to the district of county ceded by the Chickasaw Indians, and the only provision in the act was the money should be used for the schools in that district independent of the question of townships, as the township feature was an impossibility in the Chickasaw territory. There was evidently something in the mind of the Congress as to the situation in Mississippi other than a township; and we know of no situation to cause the Congress to use the word district in conjunction with township except this Chickasaw territory situation. It is clear that in so far as the "district of county" is concerned, the Congress did not attempt to prescribe the method of distribution of the fund in said "district of county."

The sole object and purpose of the reservation of land for school purposes was to educate the children of the state, the education of one child was just as important and as much desired as the education of any other child, and if a system is adopted by which each child has the same benefits conferred upon it as every other child, then the real purpose of the statutes, both state and congressional, is accomplished.

The paramount consideration in the distribution of school funds has always been to preserve equality and uniformity. While it may be that a separate school district that has an organization and a taxing power might be required to raise funds with which to meet a decree similar to the one sought in this suit, yet if a township or townships in a county has received more of this Chickasaw fund than it is entitled to under the rule contended for in the bill of complainant, we know of no remedy that could be resorted to to force such a township to refund the overplus received by it of this Chickasaw school fund. We would therefore have one portion of a county dealt with differently from other portions of the county. We, therefore think that our demurrer, in which we contended

that the county is a unit instead of a township, ought to be sustained.

Our fourth ground of demurrer is that this suit ought to be brought by the state and not by the county, if anyone is entitled to bring the suit. The acts of Congress place these lands and the funds arising from the sale or lease thereof in the state of Mississippi to be by it held in trust. This proposition is so clear and has been so many times so decided by this court that we only refer to the cases of *Jones v. Madison County*, 72 Miss. 777, and *Robertson v. Monroe County*, 119 Miss. 520, in which cases it is held that the state is a trustee and as a trustee has control of this school fund derived from the Acts of Congress. Alcorn county certainly has no authority whatever given to the county to control this fund for the state. The Congress nor the legislature of Mississippi has never intrusted the county with any authority to control or direct distribution of this fund.

The state has heretofore, through its legislature and departments, distributed this money among the counties as a unit and ignored the township feature contended for in the bill of complaint. If that was lawful, then it is the duty of the state to correct the ruling, and the power is lodged alone in the state and cannot be exercised by any other person or subdivision of the state.

If we are mistaken in this view, then the state ought to be sued for the improper distribution of this fund, and not the city of Corinth or the Corinth separate school district; the money is in the hands of the state. The state made the appropriation thereof and turned the same over to the separate school district of Mississippi. If this was an unlawful act, then the remedy ought to be against the party responsible therefor. The city received the money from its sovereign and certainly ought to be responsible to no one but its sovereign; so that either way you look at the matter, this suit is either brought by the wrong party or against the wrong party. One or the other propositions is true.

The special demurrer in this case ought to have been sustained. The case of *Town of Crenshaw v. Panola County*, 76 So. 741, does not apply; this suit is brought in the name of revenue agent for the use of Alcorn county and the Chickasaw school fund. The Chickasaw school fund has no entity as to make it a party to a suit. That part of the bill therefore must be left out of consideration. The county of Alcorn is not shown to have any interest in the matter in controversy so as to make it the real beneficiary of the suit so as to defeat the plea of the statute of limitations. The fund sued for would go to the different townships which have not received their proper *pro rata*, if the suit is successful, and the real beneficiaries are those townships, and no constitutional or statutory enactment grants immunity against the statute of limitation to a township.

The nominal plaintiff may be a party entitled to immunity from the statute of limitations, but the test is: Is the real beneficiary such a person? If not then the statute does apply. *United States v. Beebe*, 127 U. S. 338, 37 L. Ed. 121; *Curtner v. United States*, 149 U. S. 662, 37 L. Ed. 890.

Recapitulation. First, when the meaning of a statute is doubtful, a practical construction put upon it, at the time of its passage, or soon afterwards, and universally acquiesced in for a long period of time, as shown by a general usage, will be entitled to great weight and will be accepted as the true construction, unless there are cogent reasons to the contrary. Black on Interpretation of Law, page 215.

The "usage" which is entitled to be considered in the construction of a statute is such as is practical, general and public. It may be the usage of the courts; it may be the usage of the executive and administrative officers of the government in the discharge of their duties. Black on Interpretation of Laws, page 217.

The above rule is universal; that the county has been adopted as the unit of distribution of the Chickasaw fund has been the uniform construction of the acts of the Con-

gress, by our legislature and administrative officers, consistently and continuously from the creation of this fund until the present day and no complaint has ever been made by Congress; therefore has become the law on the subject. Second, the complainant has no right of action as shown by the bill under the law. Third, the special demurrer ought to be sustained.

We submit that this case ought to be reversed and dismissed here.

*Thomas H. Johnston*, for appellee.

Appellant's contention "that, in the distribution of this Chickasaw school fund, the county as a whole should be taken as the unit for distribution according to the number of educable children therein, and not the different townships" is not tenable. The distribution of this fund is now made to the different counties strictly upon an acre, or acreage basis, and not upon the basis of the number of educable children in the county. By an act of the legislature of 1856 (chap. 56, page 142), the basis for the distribution of this fund was stipulated as the ratio of the area of the counties to the total area of the lands of the Chickasaw cession (Par. 3).

This is the present method of the distribution of this fund, the figures showing the total number of acres in each county and the total number of acres in the cession being certified to the state auditor, by the state land commissioner in May, following each regular biennial session of the legislature which makes provision for the payment of the interest on this fund by appropriation.

This method of distribution to the different counties is in accord with the terms and conditions of the trust by which the lands, originally reserved for school purposes by virtue of the Georgia compact, were held by the state; and in accord with the terms and conditions of the trust imposed by the United States when the Chickasaw school lands were granted to the state in lieu of the original six-

teenth sections. A distribution to the counties, based upon the number of educable children in each county, would be unfair to the counties of larger area and smaller number of educable children, as there was originally reserved in each county for school purposes the sixteenth section of each township; then each county should be entitled to an interest in the land granted in lieu of the sixteenth sections in proportion that its area bore to the entire area of the Chickasaw cession. Then to distribute the interest arising from the fund created by the sale of this land to the different counties on the basis of the number of educable children would be manifestly unfair and contrary to the express terms and conditions of the trust. If this be true it is equally as true that it would be unfair to distribute this fund, which is distributed to the counties on an area basis to the different townships of the county upon the basis of the number of educable children in each township.

In accord with the Georgia compact, by an act of Congress, approved March 3, 1803, section 12 of chapter 27 (U. S. Statutes at large, Vol. 2, page 234) the sixteenth section of every township in the then Mississippi territory was reserved for the support of schools within the same. Then in the outset, each township had reserved for it an equal amount of land to be used for the support of schools in the township; but by the treaty with the Chickasaw Indians before mentioned, the United States violated this compact, and the sixteenth sections were all sold. In order to carry into effect the existing compact, which had been by the state of Georgia for the state of Alabama and Mississippi, Congress passed the act, approved July 4, 1836, heretofore referred to, the state of Mississippi was granted an amount of land equal in area to one thirty-sixth part of the entire Chickasaw cession, in lieu of the sixteenth section sold, and it was provided therein, "and said lands, thus selected shall be holden by the same tenure, and upon the same terms and conditions, in every respect, as the

state now holds lands heretofore reserved for the use of schools in said state."

The state revenue agent contends that this gave to each township in the Chickasaw cession an equal interest in the lands so reserved and set apart by said act; and that when said lands were sold by state and congressional authority, each township was entitled to an equal interest in said fund and an equal share in the interest arising therefrom.

Appellants contend that this is impossible. That the law with reference to the sixteenth section funds provides that the funds arising from the sale or lease of the sixteenth sections shall be used in the township where the sixteenth section is located. And that this is impossible in the Chickasaw cession, and this rule cannot apply because all the land was sold, and none of the land granted by the Act of 1836 is in any township or county in the Chickasaw cession. If this reasoning held good, many of the townships in the state lying outside the Chickasaw cession would be without the benefit of the township fund; for it frequently happened that the sixteenth section had already been taken up under Spanish and British land grants, before this reservation for school purposes was made by the Act of 1803. When this contingency arose, the township was granted a section in lieu of the sixteenth section, sometimes it was in the same township but frequently the lieu section was located in another township, or even in another county. In the Chickasaw cession this contingency arose, but arose as to all the sections numbered sixteen and to all the townships in the cession, and hence Congress by the Act of 1836 gives to these townships, thus deprived of their sixteenth sections, sections located elsewhere. No attempt was made under this act to select particular sections and award them to particular townships, but an amount of land equal to one thirty-sixth part of all the lands of the Chickasaw cession was to be selected from any unsold public lands in the state, and was to vest in the state of Mississippi in lieu of said sixteenth sec-

tions, and this land was to be held by the same tenure, and upon the same terms and conditions, in all respects, as the lands theretofore reserved for the use of schools.

In other words, the government was simply carrying out the existing compact with the state of Mississippi, and that compact reserved the sixteenth section of each township in the state for the support of the schools within the same. Under the original compact, and the Act of Congress of 1903, each township in the Chickasaw cession had been guaranteed an equal amount of land for school purposes within the township, then each township should have an equal interest in the lands selected under the Act of 1836, and necessarily an equal interest in funds for which said lands were sold.

Again appellants contend on page 3 of their brief that the last clause of section 2 of the Act of Congress of 1836, which is in this language, to-wit: "the lands thus selected shall be holden by the same tenure and upon the same terms and conditions in every respect, as the state now holds the lands heretofore reserved for the use of schools in said state," only has reference to the land itself, that as long as the land was held by the state, the conditions of the trust must be complied with, but if the lands were sold, there was absolutely nothing binding upon the state of Mississippi as to how the fund should be distributed. All that was required was that the funds be used for school purposes within the territory, that the distribution of this fund is left entirely to the legislature of the state.

If this be true with reference to the Chickasaw cession lands, it would apply with equal force to the reserved sixteenth sections in the other parts of the state. But the courts have long since decided that these township funds, arising from the sale or lease of the sixteenth section, or section set apart in lieu thereof, which were reserved for the use of schools within the township, cannot be diverted from the township, or used for anything else than schools within the particular township. *Morton v. Grenada Academy*, 8 S. & M. 786; *Bishop v. McDonald*, 27 Miss. 371;

*Jefferson Davis County v. James-Sumrall Lumber Co.*, 94 Miss. 530, 49 So. 611; *Davis v. Indiana*, 94 U. S. 794; *Moss Point Lbr. Co. v. Harrison Co.*, 89 Miss. 571-2.

It is the contention of the state revenue agent that regardless of what acts the legislature of the state of Mississippi may pass declaring how such funds shall be distributed, such acts have no binding force or effect whatever unless they are in accord with the terms of the trust created.

Appellants seem to be of the opinion, from the number of acts of the state legislature which they have cited, that the legislature has selected the county as the unit for the distribution of this fund. This is not the case, for in that event each county would receive the same amount. The fund is now distributed to the counties on an area basis, as we have attempted to show heretofore, and no two counties receive the same amount. We contend that such distribution is in accord with the terms of the trust as far as the counties are concerned, and we have no quarrel with this method of distribution as far as it goes; but to completely perform the terms and conditions of the trust, the distribution of this fund should be carried a step further, and each township, or fractional part of a township in the county should receive its proportionate part of the fund in the ratio of its area.

Again appellants on page 7 of their brief contend that the real object and purpose of this reservation of land was for the education of the youth of the land and could be equitably subserved under one system as well as the other; and, on page 8, the education of one child was just as important and as much to be desired as the education of any other child, then if a system is adopted in which each child has the same benefits conferred upon it as every other child, then the real purpose of the statutes, both state and congressional, is accomplished. Unfortunately, appellant's ideal method of distribution has not been adopted in this state, for the children of some of the Chickasaw counties received a great deal more from the interest from this fund

than the children of other counties, but under the terms of the trust, this is unavoidable. While the primary object of the reservation of this land for school purposes, as appellants suggest, is for the education of the youths of the land, this was not the only object Congress had in view when it reserved the sixteenth section of every township for the use of schools within the same. There must have been some other purpose Congress had in view, other than the education of the youth of the land, or else each state would have been granted a body of land for the use of the schools of the state, and in this event, each child would have been entitled to exactly the same amount and would have been given the same opportunity as every other child.

Appellants contend, that because of the fact that the terms of the trust have been so long violated, that this abuse should not be corrected at this late date, and that the language of the court in the case of *Connell, et al. v. Woodward, et al.*, 5 Howard, 672, is appropriate in this case. In that case it was contended on the one hand that the Act of 1803, which reserved from sale the sixteenth section in every township in the state to be used for the support of the schools within the same, was a grant to the state of this land for the purposes therein named, and the state would hold the legal title as trustee; while on the other hand it was contended that the legal title to the land never vested in the state but remained in the United States and that the legislature of the state could not give the trustees, or any other person, any authority over the sixteenth sections. And the court deciding the case in favor of the first contention, made use of the language quoted by appellants.

Appellants further contend that the words, "and provided further, that in all cases the money arising from the sales of lands within a particular township and district shall be appropriated for the use of schools within the township and district," as appears in chapter 35, Acts of Congress, 1852 (Statutes at Large, Vol. 10, page 6), which act

ratifies the sale or lease of the school lands theretofore made by the state, and authorizes further sale or lease of the remaining lands reserved for school purposes, shows that it was the intention of Congress that the money arising from the sale or lease of the lands granted the state of Mississippi in lieu of the sixteenth sections of the Chickasaw cession, should be used for the schools in that territory independent of the question of townships; and that Congress did not attempt to prescribe the method of the distribution of the funds in said district of the county, and that district or county, meant the Chicksaw cession.

It does not at all follow that this was the congressional intent. In this act Congress ratified the sales already made by the state and authorized further sales, and the state was only given unlimited authority as to the manner in which the funds should be invested. It is expressly stipulated in this act that the funds should be used for the use and support of the schools within the several townships and district of county for which they were originally reserved, and for no other use or purpose whatever. What was the condition at that time? In a part of the state, the terms of the Georgia compact, and the provisions of the Act of 1803, had been complied with, and the sixteenth section of every township, or sections given in lieu thereof, had been reserved for the use of schools within said townships; hence Congress, by the act referred to, directs that the funds arising from these sections shall be used in the township for which they were originally reserved for school purposes and for no other use whatever. That as to the other school lands, that is to say, the lands granted the state by the United States in lieu of the sixteenth sections, sold in the Chickasaw cession, the funds arising from the sale of these lands could not be used for schools outside this district or territory, but the act nowhere abrogates the terms upon which the state took these "lieu" lands, and those terms had been made specific and definite by the Act of 1836, which provided that these lands were to be held by the same tenure, and upon the same condi-

tions and terms, in every respect as the sixteenth section lands were held, and one of these terms and conditions was that the fund should be used "for the support of schools within the township."

The Act of 1852 does not give any method for the distribution of the fund, further than to provide that it must be used for schools within the district. This was not necessary; the terms had already been given in unequivocal language. Why should Congress make a distinction between the townships of the southern and the northern parts of the state? The same condition prevailed in both, and originally the same reservation for school purposes of the sixteenth section in every township had been made for the entire state.

In construing the Act of Congress of 1836, by virtue of which these lands vested in the state of Mississippi, we should take into consideration not only the plain language of the statute itself, but also look to the title of the act, to ascertain the congressional intent. This act is entitled, an act to carry into effect, in the states of Alabama and Mississippi, the existing compacts with those states with regard to the five per cent. fund and the school reservations." Thus congress states that by this act, it is intended to carry into effect the existing compact with the state of Mississippi regarding the "school reservations." What was this existing compact? The state of Georgia, when it ceded the territory now comprising the states of Alabama and Mississippi, ceded the territory on certain conditions, one of which was that the sixteenth section of every township should be reserved for the support of schools within the township. Congress by the Act of 1803, in carrying out this compact, reserved the sixteenth section in every township for the support of schools within the same. By the treaty with the Chickasaw Indians, heretofore referred to, the United States violated this compact, and the sixteenth sections of the Chickasaw cession were all sold; then to carry into effect the existing compact, Congress passed the Act of 1836, which provides that a certain

amount of the public lands shall be selected, which amount shall be equal in area to one thirty-sixth part of the entire area of the lands ceded by the Chickasaws, and the lands thus selected shall vest in the state of Mississippi for the use of schools in said territory, and said lands shall be holden by the same tenure, and upon the same terms and conditions, in every respect, etc. What were the terms and conditions upon which the lands were originally reserved for school purposes. The only terms or conditions laid down in the original reservation, and in the Act of 1803, was that the sixteenth section is reserved for the support of schools within the township and if these were not the terms and conditions on which these lands were held, we are at a loss to know what terms and conditions were referred to. Whatever these terms and conditions were upon which these sixteenth sections were originally reserved, it is evident from the plain language of the Act of 1836, that Congress wanted the same terms and conditions imposed upon the lands granted in lieu of the sixteenth sections sold in the Chickasaw cession as obtained on the original reservations thereof, for the Congress, after providing that these lands shall be held upon the same terms and conditions as the lands heretofore reserved for the use of school in the state, to make its meaning clear and emphatic, adds the words, in every respect. If the original compact, the Act of 1803, and the Act of 1836 are construed together, also taking into consideration the conditions which prevailed at the time, it is the manifest intention of Congress that the Chickasaw school funds are township funds, and, as in the sixteenth section funds, the integrity of the same as a township fund should remain inviolate, to the end not only that the youths of the state might be educated but that the entire country might be more uniformly settled and developed.

Appellants contend, in support of their fourth ground of demurrer, that the county is without authority to bring such suit, and that it should have been brought in the name of the state. The case of *Jones v. Madison Co.*, 72 Miss.

777, cited by appellants, nowhere holds, as far as we have been able to ascertain, that the county is without authority to bring the suit; but it does hold as appellants contend that the state holds these lands in trust for the different townships.

In the case of *Robertson v. Monroe Co.*, 118 Miss. 520, also cited by appellants, the county had borrowed some of the sixteenth section funds and agreed to pay interest on the same, and if the interest were not used, to reinvest the same. The county neglected and refused, upon demand being made, to pay this interest, and the court at page 537 said:

"Manifestly, the board of supervisors could not be a party defendant and a party complainant, and under the allegations of the bill, the board refused, when requested and directed to make payment to do so. We think in this case that the state had the right to bring the suit as trustee, etc."

Appellants again fall into the error of saying that the state heretofore, though its legislature and departments has distributed this money to the county as a unit and ignored the township. It is true that under chapter 56, Laws of 1856, and all laws passed by the legislature subsequent thereto, it is provided that the interest from the Chickasaw school fund should be paid to the county treasurer of each county in the cession at certain specified times; but, as we have attempted to point out before, the fund is not distributed to the counties as a unit, nor is it distributed to the counties upon the basis of the number of educable children in each, for the above mentioned act provides specifically that distribution is to be made to the counties on an area basis upon the ratio therein set out. Under this act each county gets the amount of interest that the townships and fractional parts of the townships therein are entitled to, but no more, and each county is certainly entitled to no less. We contend that this method of distribution as far as it goes is correct and in accord with the terms and conditions of the trust, and the state

has nothing to correct insofar as the county is concerned.

Appellants say that if they are mistaken in the state's power to bring this suit, then the state itself ought to be sued for the improper distribution of this fund, and not the city of Corinth and the Corinth separate school district. Appellants say, in this connection, the state made the appropriation thereof and turned the same over to the separate school district. Appellants say, in this connection, the state made the appropriation thereof and turned the same over to the separate school districts of Mississippi. And if this were an unlawful act, then the remedy should be against the state. Again appellants are mistaken; these funds are not turned over by the state to the separate school districts, but are paid directly into the county treasury, and is then paid out by the county treasurer.

The statutes, regulating the right of the counties to sue are three in number. Section 4850, Code of 1906 (section 3170, Hemingway's Code), provides: "The state shall be entitled to bring all actions and all remedies which individuals are entitled to in a given case, etc." Section 4806, Code of 1906 (section 3171, Hemingway's Code), provides that "any county may have like remedies to recover any property belonging to it, or damages for injury thereto; and actions may be brought in behalf of the county, either by a district attorney or some one employed by the board of supervisors." The county has the right to sue for and recover any property belonging to it, and we contend that the term property belonging to it, is broad enough in its scope and meaning not only to cover property, the ownership of which is absolutely in the county, but also property in which the county has a qualified ownership, or of which it has possession, or has under its control.

Section 309, Code of 1906 (section 3682, Hemingway's Code), provides, that "any county may sue and be sued by its name, and suits against the county shall be instituted in the court having jurisdiction of the amount sitting at the county site; but suit shall not be brought by the county without the authority of the board of supervisors, ex-

cept as otherwise provided by law. And section 310, Code of 1906 (section 3683, Hemingway's Code), provides that, suit may be brought in the name of the county, where only a part of the county or of its inhabitants are concerned, and where there is a public right of such party to be vindicated.

In the case of *Warren Co. v. Gans*, 80 Miss. 76, 31 So. 539, it was held that the county could bring suit or an action in replevin for logs cut for sale from sixteenth section lands leased in 1834 for ninety-nine years. If the county had the right to sue in a case of replevin for logs cut from a sixteenth section, why should it not have the right to sue for a misappropriation of the Chickasaw school fund, after the same has been paid into the county?

We take it that appellants will not contend that the state revenue agent is without authority to bring this suit if the county is entitled to sue, even if suit is not authorized by the board of supervisors, for section 7056, Hemingway's Code gives him this authority.

In the case of *Robertson v. Monroe Co.*, 70 So. 187, it was held by this court that the state revenue agent may sue a county for the use and benefit of a city, then the converse of this proposition must also be true that the state revenue agent may sue a city for the use and benefit of the county.

If we are correct in our contention in this case that the county has such an interest in the Chickasaw school fund, as would give it the right to sue for a wrongful disposition of the same, after it has been paid into the county treasury, then the court below was correct in overruling appellants special demurrer under the authority of *Town of Crenshaw v. Panola Co.*, 76 So. 741.

We respectfully submit that the case should be affirmed and remanded for an accounting.

SMITH, C. J., delivered the opinion of the court.

The revenue agent exhibited an original bill in the court below for the use of the county of Alcorn against the city

of Corinth by which he seeks to recover from the city several thousand dollars alleged to have been received by the city since 1892 from the interest on the Chickasaw school fund for the use of its separate school district in excess of its rightful share thereof. A demurrer to the bill was overruled.

The Chickasaw school fund was obtained by the state from the sale of the land set apart to the state of Mississippi for the use of schools within the territory ceded to the United States by the Chickasaw Indians and in which territory the county of Alcorn, in which is the city of Corinth, is situated. The city of Corinth was formed into a separate school district in 1892. The interest on this fund fixed by section 212 of the present state Constitution at six per centum per annum is applied by the state to the support of public schools in the Chickasaw territory under the provisions of chapter 56, Laws of 1856.

The contention of the revenue agent is that under the act of Congress by which the land was set apart to the state the interest on this fund should be equally divided among the townships in the territory ceded to the United States by the Chickasaw Indians, and not as provided in chapter 56 of the Laws of 1856, and that, because of this alleged violation of its trust by the state, the city of Corinth has received for the maintenance of its separate school district more than its share of this interest which sum the revenue agent seeks to recover for the county for the use of public schools in the townships therein other than the township in which the city of Corinth is situated.

In order that the ground of the revenue agent's contention may be properly understood, it will be necessary to examine the various laws and treaties under which the sections No. 16, and the land from which the fund here in question was derived, were set apart by the United States to the state of Mississippi for school purposes.

The territory ceded to the United States by the Chickasaw Indians was formerly a part of and was ceded by the state of Georgia to the United States in 1802 by Articles

of Cession and Agreement, the fifth section of the first article of which provides:

"That the territory thus ceded shall form a state, and be admitted as such into the Union, as soon as it shall contain sixty thousand free inhabitants, or at an earlier period if Congress shall think it expedient, on the same conditions and restrictions, with the same privileges, and in the same manner as if provided in the ordinance of Congress of the thirteenth day of July, one thousand seven hundred and eighty-seven, for the government of the western territory of the United States; which ordinance shall, in all its parts, extend to the territory contained in the present act of cession, that article only excepted which forbids slavery." Mississippi Code of 1823, p. 504; Mississippi Code of 1857, p. 646.

Article 3 of the Ordinance of July 13, 1787, referred to in the Articles of Cession and Agreement, is as follows:

"Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall, from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them." Laws of the United States, Resolutions of Congress under the Confederation, etc., Relating to the Public Lands, p. 360.

The territory so ceded, together with territory south of it, was afterwards, with the consent of the state of Georgia, formed into the states of Alabama and Mississippi.

On the 3d day of March, 1803, Congress enacted a statute entitled:

"An act regulating the grants of land, and providing for the disposal of the lands of the United States south of the state of Tennessee."

Which act, after providing for the disposition of a portion of the land therein dealt with, continues in sections 10, 11, and 12, as follows:

"That a surveyor of the lands of the United States, south of the state of Tennessee, shall be appointed, whose duty it shall be . . . to cause the lands above mentioned, to which the titles of the *Indian tribes have been extinguished* [italics supplied], to be surveyed and divided in the manner hereafter directed.

" . . . The said surveyor shall also cause all the other lands of the United States, in the Mississippi territory, to which the *Indian title has been extinguished* [italics supplied], to be surveyed as far as practicable, into townships, and subdivided into half sections, in the manner provided for the surveying of the lands of the United States, situate northwest of the river Ohio, and above the mouth of the Kentucky river. . . .

"That all the lands aforesaid, not otherwise disposed of, or excepted by virtue of the preceding sections of this act, shall, with the exception of the section number sixteen, which shall be reserved in each township for the support of schools within the same, . . . be offered for sale," etc.

2 Stat. at Large, 229; Mississippi Code of 1823, p. 511; Mississippi Code of 1857, p. 647.

On April 21, 1806, Congress enacted a statute (2 Stat. 400) amending or supplementing the Act of March 3, 1803, the sixth section of which provides:

"Whenever the section number sixteen shall fall upon land already granted, by virtue of any act of Congress, or claimed by virtue of a British grant, the secretary of the treasury shall locate another section in lieu thereof, for the use of schools, which location shall be made in the same township, if there be any other vacant section therein, and otherwise, in an adjoining township." Code of 1823, p. 518; Code of 1857, p. 657.

The title of the Choctaw Indians to the land in the Mississippi territory occupied by them was extinguished in

September, 1830, by the treaty of Dancing Rabbit Creek by which the United States ceded to the Choctaw nation—"A tract of country west of the Mississippi river, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," etc.

And the Choctaws ceded to the United States—"The entire country they own and possess east of the Mississippi river." Mississippi Code of 1857, p. 707.

The title of the Chickasaw Indians to the land in the Mississippi territory occupied by them was extinguished in October, 1832, by the treaty of the Pontotoc Creek by which the Chickasaw nation ceded—"to the United States all the land which they own on the east side of the Mississippi river, including all the country where they at present live and occupy."

And the United States agreed to sell all of the land thereby ceded to it, and—"As a full compensation to the Chickasaw nation, for the country thus ceded, the United States agree to pay over to the Chickasaw nation all the money arising from the sale of the land," etc. Mississippi Code of 1857, p. 714.

One of the results of the treaty between the United States and the Chickasaw Indians was that the sixteenth sections situated in the land theretofore occupied by the Chickasaw Indians never became available to the state of Mississippi for school purposes.

On July 4, 1836, Congress enacted a statute entitled:

"An act to carry into effect, in the states of Alabama and Mississippi, the existing compacts with those states in regard to the five per cent. fund, and the school reservations."

Section 2 of which provides:

"That there shall be reserved from sale, in the state of Mississippi, a quantity of land, equal to one thirty-sixth part of the land ceded by said Chickasaws as aforesaid, within said state of Mississippi, which land shall be selected under the direction of the Secretary of the Treasury, in sections, or half sections, or quarter sections, out

of any public lands remaining unsold, that shall have been offered at public sale within either of the land districts in said state of Mississippi, contiguous to said lands within said state, so ceded by the Chickasaws as aforesaid; which lands, when so selected as aforesaid, the same shall vest in the state of Mississippi, for the use of schools within said territory in said state, so ceded as aforesaid by the Chickasaws; and said lands, thus selected, shall be holden by the same tenure, and upon the same terms and conditions, in all respects, as the said state now holds the lands heretofore reserved for the use of schools in said state." Mississippi Code of 1857, p. 682; 5 U. S. Stats. at Large, p. 116.

On May 19, 1852, Congress enacted a statute "to authorize the legislature of the state of Mississippi to sell the lands heretofore appropriated for the use of schools in that state, and to ratify and approve the sales already made," which reads as follows:

"That the legislature of the state of Mississippi shall be, and is hereby authorized to sell and convey in fee-simple, or lease, for a terms of years, as the said legislature may deem best, all or any part of the lands heretofore reserved and appropriated by Congress for the use of schools within said state, and to invest the money arising from said sales, as said legislature may direct, for the use and support of schools within the several townships and districts of country for which they were originally reserved and set apart, and for no other use, or purpose whatsoever: Provided, said lands or any part thereof, shall, in no case, be sold or leased without the consent of the inhabitants of such township or district to be obtained in such manner as the legislature of said state may by law direct; and provided further, that in all cases, the money arising from the sales of lands within a particular township and district, shall be appropriated to the use of schools within that township and district. . . .

"That sales heretofore made by the authority of the legislature of the state of Mississippi of lands reserved

and appropriated as aforesaid, are hereby ratified and approved in the same manner and to the same extent, as if this act had been in force at the time of said sales."

10 Stat. at Large, p. 6; Mississippi Code of 1857, p. 696.

The land set apart to the state by the Act of Congress of July 4, 1836, was sold and the money received therefor was paid into the state treasury under the provisions of chapter 3, Mississippi Laws of 1848, the fifth section of which provides that the money so received shall be paid into the treasury, and "shall be a charge upon the state of Mississippi, to be held in trust by said state for the use of schools in the Chickasaw cession, and to be applied to that purpose as hereafter to be provided by law."

In 1856 the state legislature enacted a statute, chapter 56, Laws of 1856, the third and tenth sections of which provide:

"That the secretary of state is hereby required to make out and furnish to the auditor of public accounts, a calculation, based on the area of territory in the Chickasaw purchase, of the proportionate amount of interest due to each of said counties; and it is hereby made the duty of said auditor to issue his warrant on the state treasurer for the said proportionate amount, upon application to him by said county treasurer, in person, or attorney in fact, accompanied with satisfactory proof that said county treasurer has fully complied with the requirements of this act. . . .

"That the interest moneys in each county shall be held subject to the order of the board of school commissioners of such county, which is hereby authorized to expend the same in accordance to the existing laws, or laws that may be hereafter passed, applicable to the respective counties of the Chickasaw purchase, in relation to common schools."

Since the enactment of this statute the interest on this fund has been remitted to the county treasurers in accordance with its provisions except that the memoranda on which the auditor apportions it to the counties is now fur-

nished him by the Land Commissioner. The statutes (Hemingway's Code, section 7387) in force when and since the Corinth separate school district was formed provide that the county common school fund shall be divided between the separate school districts of a county and that portion of a county not included in separate school districts on the basis of the number of educable children in each, and that—

“The county treasurer shall . . . pay over to the treasurer of a municipality in his county which is a separate school district, all money to which the separate school district may be entitled; and the treasurer of each municipality which is a separate school district, shall perform like duties as are devolved on county treasurers, as far as applicable in reference to money for the support of schools.”

The interest here in question, as we understand the allegations of the bill, was disposed of by the state, county, and municipal treasurers in accordance with the foregoing provisions of the statutes.

The contention of the revenue agent as set forth in the bill of complaint is that—

“It was the intention of the Congress of the United States that the lands so selected and reserved for the use of the schools in the Chickasaw Cession and the interest arising from the fund realized from the sale of said lands should be distributed *pro rata* to the townships and fractional parts of a township being in said Cession, that such distribution should be made upon the basis that the ratio of the area of each township, or fractional part of a township, bears to the total area of said cession in said state, to the end that each township or fractional part should have an amount equal in proportion to its area for the use of schools therein, and thus bring about and produce as nearly an equal and uniform development and settlement of all parts of said Chickasaw Cession, and that the state of Mississippi so holds said fund in trust for the use of

the schools, as aforesaid, and upon the terms and conditions aforesaid."

In support of this contention it is said that the Ordinance of July 13, 1787, incorporated by reference into the Articles of Cession and Agreement, by which the state of Georgia ceded her western territory to the United States, reserved the sections No. 16 therein for the use of schools in the townships wherein they are situated, and that the United States violated this agreement with the state of Georgia when it sold the sections No. 16 in the Chickasaw territory pursuant to the treaty with the Chickasaw Indians, and, in order to right the wrong thereby done, Congress set apart to the state of Mississippi, by the Act of July 4, 1836, an area of land equal to the area of all of the sections No. 16 in the Chickasaw territory "for the use of schools within said territory" to be holden by the state "upon the same terms and conditions, in all respects, as the said state now holds the lands heretofore reserved for the use of schools in said state," which act, when construed in the light of the wrong thereby sought to be righted, must be held to have reserved the land for the use of the schools in all the townships in the Chickasaw territory, each township to share equally therein with each of the other townships.

There is no foundation in fact for the charge that the United States violated its agreement with the state of Georgia in selling the sections No. 16 in the Chickasaw territory, or that the state of Mississippi is violating its trust in distributing in accordance with chapter 56, Laws of 1856, the interest on the fund derived from the sale of the land set apart to it by the Act of Congress of July 4, 1836, for use of schools in the Chickasaw territory.

Neither the Articles of Cession and Agreement by which Georgia ceded her western territory to the United States, nor the Ordinance of Congress of July 13, 1787, for the government of the western territory of the United States therein referred to, set apart any land whatever for the use of schools, the only reference to schools in either of

them and the only obligation assumed by the United States in this connection is that contained in article 3 of the Ordinance that—

“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Laws of the United States, Resolutions of Congress under the Confederation, etc., Relating to the Public Lands, p. 360.

The setting apart of the sections No. 16 in each township for the use of schools within the township was initiated by the Ordinance of May 20, 1785, for “disposing of lands in the western territory,” Laws of the United States, Resolutions of Congress under the Confederation, etc., Relating to Public Lands, p. 349, and thereafter became the government’s settled policy, so that when it came to comply with its agreement with the state of Georgia it did set apart, by the Act of March 3, 1803, each section No. 16 in the territory ceded to it by that state for the use of schools in the townships, but it was expressly provided therein that the land should be surveyed and the townships and sections thereby located when the title of the Indian tribes thereto should be extinguished. By this statute the state acquired the right to each sixteenth section in the designated territory, when, but not until, the Indians’ right of occupancy was extinguished and the section had been surveyed as provided by law. *Gaines v. Nicholson*, 9 How. 356, 13 L. Ed. 173; *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338; *Beecher v. Wetherby*, 95 U. S. 517, 24 L. Ed. 440.

Not only is it expressly provided in the Ordinance of July 13, 1787, referred to in the Articles of Cession and Agreement by which the state of Georgia ceded the western territory to the United States, that “the utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent,” but such had then become and there-

after continued to be the government's settled policy in dealing with the Indians in accordance with which not only the acts of Congress here in question, but all other acts of Congress under which the public lands were disposed of, made the sale thereof, or the reservation of parts thereof for the use of schools, dependent upon the extinguishment of the title of the Indians thereto, so that in its treaty with the Chickasaw Indians the United States, instead of violating its agreement with Georgia, complied both with the letter and the spirit thereof.

Whether the sixteenth sections were donated to the state of Mississippi by the state of Georgia, as was said to be the case in *Jones v. Madison County*, 72 Miss. 778, 18 So. 87, or whether they were donated to the state by the United States pursuant to its general policy for the support of schools and its agreement with the state of Georgia, as seems to be the fact, it is true that the land from which the fund here in question was derived was given to the state by the United States in lieu of the sections No. 16 which did not become available to the state because of the treaty with the Chickasaw Indians, nevertheless the terms of the trust upon which the land was given must be gathered from the act of Congress of July 4, 1836, by which the grant was made, from which it appears that the grant was "for the use of schools within said territory in said state, so ceded as aforesaid by the Chickasaws," without any provision that any particular portion thereof or its proceeds should be devoted to the use of schools in any particular portion of the territory for the use of schools within which the land was granted. The provision in the act that the land "shall be holden by the same tenure and upon the same terms and conditions, in all respects, as the said state now holds the lands heretofore reserved for the use of schools in said state," refers, not to the territory within which the land should be used for school purposes, but to the terms and conditions on which the land should be held by the state for the use of schools within the designated territory.

The Act of Congress of May 19, 1852, authorizing the state to sell the land reserved therein for the use of schools, can have no effect upon the terms of the trust under which the state held the land from which the fund here in question was derived, for two reasons: First, when the act was passed the state's title to the land had fully vested so that it was then beyond the power of Congress to change the terms of the grant and the state had full power to dispose of the lands without the consent of Congress. *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338; *Jones v. Madison County*, 72 Miss. 778, 18 So. 87. Second, the act simply provides that the money arising from the sale of the lands shall be used for the support of schools within the territory for the support of schools in which the land was originally reserved.

But if we should be mistaken as to this, the result here would be the same, for in administering the trust the state must act through its legislature, and in so doing "assumes the same measure of responsibility that pertains to it in the exercise of its law-making power. No other mode can be suggested in which a state can manage a fund for charitable uses. It must by statute derive the machinery to carry out the object. If the agent or officer of the state, acting under the law, disobeys its injunctions, transcends his powers, or refuses altogether to act then it is in the jurisdiction of the judicial department to restrain his illegal acts and compel him to conform to the law." *State v. Vicksburg, etc., R. Co.*, 51 Miss. 361. But when the agent or officer of the state charged by its laws with the duty of administering the trust, administers it in accordance with such laws, he cannot be called in question for so doing and is not personally liable to the *cestui que trust* for any diversion of the trust fund which may result because of his having disposed of it as he was directed by law so to do. The state in administering a trust acts in its sovereign capacity, and the acts of its administrative officers in so far as they obey its commands are the

acts of the state for which it alone is responsible unless the Constitution should provide otherwise.

The treasurer of the city of Corinth in receiving and disbursing the interest on the fund here in question, which was paid over to him by the treasurer of Alcorn county for the use of the Corinth separate school district, acted simply as the state's agent, and since he complied with the law in making the disbursement he cannot be held liable for any diversion of the interest on the fund which may have resulted from the method adopted by the state for administering the trust. The city of Corinth for the same reason cannot be held liable therefor assuming for the sake of the argument that a municipality constituting a separate school district is liable for the misuse of common school funds by its officials charged by law with the management thereof.

Whether or not an injunction would lie to prevent the state's agent from disposing of trust funds of which the state is the trustee in violation of the terms of the trust, though in accordance with the laws adopted by the legislature for administering the trust, is not before us and is not intended to be here decided, though necessarily included in the further observations now to be made.

Another question presented by this record, a decision of which is not necessary for the final disposition of this case and which is referred to only that it may not appear to have been inferentially decided by what has heretofore been said, is: Can the state's administration of the trust be called in question in one of its courts and the court's judgment as to the obligation assumed by the state in accepting the trust, and as to how that obligation should be discharged, be substituted for the judgment of the state's legislature? In which connection the cases of which the following are a type will be of interest: *State v. Vicksburg, etc., R. Co.*, 51 Miss. 361; *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338; *Mills County v. Burlington, etc., R. Co.*, 107 U. S. 557, 2 Sup. Ct. 654, 27 L. Ed. 578; *County of Cook v. Calumet, etc., Dock Co.*, 138 U. S. 635, 11 Sup.

Ct. 435, 34 L. Ed. 1110; *Morton v. Grenada Academies*, 8 Smedes & M. 773; *Davis v. Indiana*, 94 U. S. 792, 24 L. Ed. 320.

In *Cooper v. Roberts*, *supra*, the court in deciding that a state has the right to sell the sixteenth sections reserved for the use of its schools without the consent of Congress used this significant language:

"The trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the state is plenary and exclusive. In the present instance, the grant is to the state directly, without limitation of its power, though there is a sacred obligation imposed on its public faith."

It follows from the foregoing views that the demurrer to the bill of complaint should have been sustained.

The decree of the court below will be reversed, the demurrer sustained, and the cause dismissed.

*Reversed.*

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BURDETT v. HINES, DIRECTOR GENERAL OF RAILROADS, *et al.*

[87 South, 470, No. 21549.]

**LIBEL AND SLANDER.** *Request by ex-employee held to release employer from liability on account of information furnished.*

In a libel suit by an ex-employee of a railroad company against such company based upon a statement to a prospective employer in response to a letter written by plaintiff to defendant to forward to a prospective employer information about plaintiff's personal character, habits, and ability and as to the cause of his leaving their employment, such information furnished in response to such letter cannot form the basis of a libel suit, where it expressly released defendant from liability for damages on account of furnishing such information.

APPEAL from circuit court of Warren county.

HON. E. L. BRIEN, Judge.

Action by George Burdett against Walker D. Hines, Director General of Railroads, and another for libel. Judgment for defendants on a directed verdict, and plaintiff appeals. Affirmed.

*Anderson, Voller & Kelly and Chaney & Ramsey*, for appellant.

Appellant is now placed in such position that he can never again work for a railroad company anywhere in the United States, by reason of the false and libelous reports made by the officers of the railroad company to another railroad. He is black-listed, as the railroad men call it, and there is no way for him to work for another railroad again. When he files his application with another railroad it is necessary, as he alleges, for him to give the name of his former employer, the Yazoo and Mississippi Valley Railroad Company.

If this railroad company continues to follow him in the future as it has done in the past, it will be absolutely necessary for him to quit the trade he has spent so many years in learning, and take up some other trade or profession. If the defendant in the court below, wilfully and maliciously made statements of him for the purpose of keeping him from obtaining employment, and has kept him from obtaining employment at his regular trade, has he not suffered injury? If he has suffered such injury would the railroad be liable but for federal control? If the railroad would be liable under the management and control of its owners, under the same circumstances, the act of Congress in question makes them liable during federal control, leaving his right of recovery unimpaired.

We are not going to argue this case further. It is so clear to us that no defense can be made that couldn't be made but for federal control. We are not going to burden the court with an extended argument. We submit to this

honorable court that this appellant has a just and righteous cause of action against the Yazoo and Mississippi Valley Railroad Company, and the director general, and we confidently expect a reversal of the lower court.

*Hirsch, Dent & Landau*, for appellee.

The declaration alleges, that said Yazoo & Mississippi Valley Railroad Company reported to the said Mobile & Ohio Railroad that the plaintiff deserted a crew at its yards in Vicksburg, which the officers knew to be untrue, and that the said railroad company by its agents and employees made the same or similar report to the Southern Railway in Atlanta, Georgia; that he is now unable to obtain employment, and has been damaged in the sum of twenty-five thousand dollars actual and punitive. The only damages averred is his alleged inability to obtain employment as a switchman with any railroad in the United States. He admits that the only publication made was to the Mobile & Ohio Railroad Company at Meridian, and the Southern Railway in Atlanta, and he studiously avoids any denial of the salient facts that these reports were made, as shown by the pleas, at his solicitation, and were copied from the records.

The appellant distinctly, unequivocally and solemnly agreed, in writing, that no damage suit should be instituted for any information furnished, and there is no principle of right, justice, or reason which would permit him to prosecute this action, either against the railroad company or the director general. He voluntarily solicited these statements; he gave a pledge that no damage would result; and he cannot be permitted now to institute suit when he contracted that no action for damages would be brought, independently of any question of privilege or qualified privilege.

Privileged Communications. Responses to Inquiries Made by the Plaintiff or Authorized Agent. "If plaintiff consented to or authorized the publication complained of, he cannot recover for any injury sustained by reason of

the publication; and the same rule applies to a publication solicited or induced by inquiry on the part of plaintiff or his agent, at least if it was procured by the fraudulent contrivance of plaintiff, himself, with a view to an action." 25 Encyclopedia of Law and Procedure, pp. 370, 371; Ibed, 392, 393; *Kansas City, M. & M. R. R. Co. v. Delaney*, 52 S. W. 151, Supreme Court of Tennessee, April 15, 1899; *Alabama & Vicksburg Ry. Co. v. J. S. O. Brooks*, 69 Miss. 168, 169, 25 Cyc. 392.

In the following cases statements made at the request of the one defamed were held privileged. *Billings v. Fairbanks*, 136 Miss. 177 (charging larceny, where plaintiff introduced subject of discussion); *Palmer v. Hummerson*, Cab. & El. 36 (statements imputing larceny, made in answer to plaintiff's question); *Newskey v. Mundt*, 4 Legal Gaz. 230 (statement by manager of park in response to inquiry why admission was refused); *Laughlin v. Schnitzer* (Tex. Civ. App.), 106 S. W. 908 (landlord's answer to tenant's question as to why she was requested to move); *Warr v. Jolly*, 6 Car. & P. 497 (statement imputing intemperance to minister, made in response to his questions); *Haynes v. Leland*, 29 Me. 233 (statements before church committee and plaintiff's attorney, at his request); *Remington v. Congdon*, 2 Pick. 310, 13 Am. Dec. 431 (*bona-fide* charges by non-member of church, where plaintiff consented that church might investigate written charges against him); *Patterson v. Frazer* (Tex. Civ. App.), 79 S. W. 1077 (where, at plaintiff's solicitation, language was used which, in connection with plaintiff's statements, imputed want of chastity); *Louisville Times Co. v. Lancaster*, 142 Ky. 122, 133 S. W. 1155 (publication or retraction of newspaper article, at request of one claiming to have been libeled); *Beller v. Jackson*, 64 Mo. 589, 2 Atl. 916 (*bona-fide* statement by station agent, made in reply to plaintiff's inquiry as to cause of discharge); *Mid-*

*dleby v. Effler*, 55 C. C. A. 355, 118 Fed. 261 (statement made by husband in response to question to wife); Note. *Christopher v. Aken*, 214 Mass. 322, 46 L. R. A. (N. S.) pp. 104, 105; 5 *Labatt's Master & Servant* (2 Ed.), pp. 6270, 6271, sec. 2022, see notes 17 *Ruling Case Law*, sec. 61, p. 320.

SAM C. COOK, P. J., delivered the opinion of the court.

We deem it unnecessary to go into the detailed pleading and evidence in this case.

The plaintiff below, appellant here, sued the Director General of Railroads and the Yazoo & Mississippi Valley Railroad Company for an alleged libel.

The plaintiff was an ex-employee of the Yazoo & Mississippi Valley Railroad Company. He was discharged by this company, and sought a position with the Mobile & Ohio Railroad Company. The latter company asked for references from his former employer. Thereupon the plaintiff wrote the Yazoo & Mississippi Valley Railroad Company, asking it to forward—

“a statement, in writing, containing all the information you may have, or can obtain, as to my personal character, habits and ability, also the cause of my leaving the employ of your road, as shown by the record of your company, or as may appear from the verbal or written statement of your officers, agents and employees.

“In consideration of your compliance with this request I hereby release your company from any and all liabilities for damages, of whatsoever nature, on account of furnishing the information above requested, which is to be used in determining my fitness for the position mentioned, and that the position mentioned was ‘for employment in the capacity of switchman.’”

The defendant furnished the statement requested by the plaintiff, and the suit is based upon alleged falsity of this statement.

The plaintiff therefore got what he asked for, and by the terms made by him he will not be permitted to maintain this suit. The learned trial judge very properly directed a verdict for the defendant.

*Affirmed.*

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BROWNLEE LUMBER CO. v. GANDY.

[87 South. 470, No. 21613.]

**CORPORATIONS.** *Evidence of contract with president insufficient to show contract of sale by corporation, in absense of showing that he contracted for it.*

In a suit against a corporation upon a contract of sale, the evidence must show with reasonable certainty that the contract was made with the corporation. Showing a contract with the president of the corporation is not enough. There must be some evidence tending to prove that the president of the corporation was contracting for the corporation.

APPEAL from circuit court of Clarke county.

HON. R. W. HEIDELBERG, Judge.

Action by N. C. Gandy against the Brownlee Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

*D. W. Heidelberg*, for appellant.

It does not appear that Gandy ever had any dealings with the Brownlee Lumber Company, while it was a corporation. It does not appear that Gandy ever knew that there was such a corporation as the Brownlee Lumber Company. He stated more than once that he had the transaction in question with J. N. Brownlee himself, and he did not know whether he was acting for himself or for a

company, or if for a company, whether the company was a corporation, a partnership, or an individual. It does not appear that Brownlee ever said or did anything to mislead or calculated to mislead Gandy as to whether the Brownlee Lumber Company was or was not a corporation, or that he was ever misled by any one, or had any opinion at any time as to what the Brownlee Company was, as to whether it was a corporation, a partnership, or an individual. It does not appear that Gandy at any time made the least effort to ascertain whether it was a corporation or not. Brownlee says that he, as an individual, had bought all of the assets of the corporation in the latter part of the year 1914, near three years before the transaction was had with Gandy. A deed conveying the land and timber by the corporation to Brownlee was on record, and Gandy is presumed to have had notice of its existence. This deed embraced the very land and timber which was cut by Gandy. He is presumed to have known that he was cutting Brownlee's timber, and that in making the trade with reference to this very timber Brownlee was acting for himself. The former stockholders of the corporation excepting Brownlee, had long since moved away, to a town north of the city of Meridian, as the testimony of Brownlee shows. In view of all these facts can it be said that Brownlee as an individual, or that the Brownlee Lumber Company as a corporation, is estopped from showing that the latter made no trade with Gandy.

In the case of *Turnipseed v. Hudson*, 50 Miss. 429, at page 436, it is stated by the supreme court that the following elements must be present in order to an estoppel: 1. There must be a representation or a concealment of material facts; 2. The representation must have been made with knowledge of the facts; 3. The party to whom it was made must have been ignorant of the truth of the matter; 4. It must have been made with the intention that the other party should act upon it; 5. The other party must have been induced to act on it. Now we submit that none of these elements of estoppel enter into the present case.

With reference to the first, second and third grounds what representation or concealment of any material fact did Brownlee make to Gandy? None. With reference to the fourth ground, can it be contended that Brownlee made any statement with the intention that Gandy should act on it? With reference to the third ground, can it be said that Gandy was ever induced to act upon any statement Brownlee ever made?

In the case of *Brown v. Wheeler*, 44 Am. Dec. 550, at page 554, the court says that the rule as it regards estoppel *in pais* is that where a man by his words or conduct, wilfully causes another to believe in the existence of certain state of things and induces him to act upon that belief, so as to injuriously alter his previous transaction, the former is concluded from the averring as against the latter, a different state of things, as existing at that time. Is there anything in the record to show that Brownlee or the Brownlee Lumber Company, a corporation, ever wilfully misled Gandy?

In the case of *Caldwell v. Auger & Herbert*, 77 Am. Dec., 515, at page 517, it is stated that: "The rule of law is clear that where one, by his words or conduct, wilfully causes another to believe in a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. *Cook v. Walling*, 10 Am. St. Rep., 17, at page 19; *McAlferty v. Cornover Lessee*, 57 Am. Dec. 60.

The second instruction is not the law. It was doubtless intended to tell the jury by this instruction that inasmuch as Brownlee did not pay the Phillips Mercantile Company what it agreed to do, according to the testimony of Gandy, then Gandy was not bound by the terms of the contract made with the company.

That he could ignore the contract and recover the value of the lumber, this the jury were told he could do, notwithstanding the fact that the declaration is based on a contract. For these reasons heretofore given the court

also erred in refusing to give the defendant the peremptory instruction asked for. For the foregoing reasons we submit that the judgment below should be reversed and the case dismissed.

*N. J. Pack*, for appellees.

The points of law presented by counsel and raised by this record are: First: Is the Brownlee Lumber Company a corporation, estopped to deny this transaction in its corporate capacity? The public was lead to believe by the conduct of appellant that it was still doing business as a corporation. It is true that Mr. Brownlee testified that he bought the real estate from the corporation and took over the business to operate, but the corporation was never dissolved, nor any notice ever given to the public by publication or otherwise that the corporation had sold its property. It was the Brownlee Lumber Company before the deed was made to J. N. Brownlee, and was the Brownlee Lumber Company right on up to the filing of this suit and trial of the case. Gandy testified that he knew of no change in the style of the firm, and that he knew that the name of Brownlee Lumber Company was on the letter heads, etc., of the company and also on their locomotives and that every bill head and every account that he received from appellant had Brownlee Lumber Company on it.

We thus have a corporation doing a general saw mill business upon a large scale, advertising to the public the name of the Brownlee Lumber Company as owner and continuing to deal with the public without ever changing the firm name of the company. Some of the stockholders who had been managing the business, who takes it over without a single change in the management, name or general method of operation, under the contention made by appellants, a corporation, with a credit established and advertised to the world as reputable and worthy of confidence and trust could, by merely executing a deed con-

vey its assets to one of its stockholders and defeat obligations afterwards made.

"Estoppels *in pais* operate against corporations in like manner as against natural persons," 10 Cyc. 1065. The rule more fully stated is: "corporations quite as much as individuals are held to a careful adherence to truth in their dealings with mankind, and cannot by representations or by silence involve others in onerous engagements and then defeat the just expectations which their conduct has superinduced."

The transfer of all of the real estate owned by appellant or even a transfer of all of its tangible effects would not operate as a dissolution of a corporation. 5 Thompson on Corporations, sec. 6493, and authorities cited.

The rule that estoppel applies to corporations the same as individuals, 10 Cyc., 1065, *supra*, is quoted with approval in 2 Thompson on Corporations, sec. 1946. See *Gown Marble Co. v. Tarrent*, 73 Ill. 608. Second: Could estoppel be relied upon by plaintiff who had not raised it in the pleadings?

Appellant contends in his brief that even though this is a case for the application of estoppel, appellee cannot invoke it because he did not plead it specially. A complete answer to this would be that appellee had no way of knowing that this defense would be relied upon.

Appellant had held itself out to the public as the Brownlee Lumber Company. It started out as a corporation and continued to do business in the same place, under the same name and under the same management. If appellant filed a special plea raising the question of non-joinder as it was required to do under section 723 of the Code of 1906, section 506, Hemingway's Code, or if it had raised the question that the Brownlee Lumber Company was not doing business any longer as a corporation by filing a special plea or giving notice of special matter under the general issue, then appellee would, of course, be required in its replication, to have met this issue. But appellant having failed to raise this question in a plea that would put

the appellee on notice, he could meet it only as it was raised, and that was when it was offered as a defense on the trial of the case.

The plea of the general issue, we respectfully submit, would not make competent this evidence, and even if it did, the evidence all went in and was before the court and jury even after the ruling of the court complained of by appellant.

We stand, however, upon the proposition that it was not necessary for the plaintiff to plead, specially estoppel in this case. In 16 Cyc., page 808, the rule is laid down that "where plaintiff has had no opportunity to plead an estoppel, he may show it in evidence without having pleaded it; and the same is true where it does not appear that plaintiff knew the facts when his complaint was drawn, or that his demand must ultimately rest upon it."

We earnestly submit that every question of disputed facts has been fairly submitted to the jury on proper instructions; that there has been no error of law committed by the court below, and that the case should be affirmed.

SAM C. COOK, P. J., delivered the opinion of the court.

The declaration charges that the plaintiff sold and delivered to the defendant lumber and logs and the defendant accepted the same amounting in value to six hundred fifty-five dollars, that the defendant was entitled to a credit of two hundred fifty-four dollars and eighty cents, and demands judgment for the balance four hundred four dollars and fourteen cents. Defendant filed two pleas—the first denying that it owed plaintiff the sum sued for or any part thereof. The second plea averred that the defendant paid all the sums due by defendant to the plaintiff. No replication was filed, but issue was taken in short.

The evidence in the case disclosed that the plaintiff had cut certain timber belonging to J. W. Brownlee and converted a part of same into lumber and delivered the same to J. W. Brownlee. The evidence fails to support the

averments of the declaration. As we read the evidence, the plaintiff did not testify that he contracted with the Brownlee Lumber Company, a corporation. It seems that there was at one time a corporation known as the Brownlee Lumber Company, and J. W. Brownlee was the president of the corporation. It also appears that the corporation had gone out of business before the transactions in this case. It was necessary for the plaintiff to prove that the corporation made the contract sued upon.

The plaintiff was a frank witness, and would not say that he contracted with the corporation, or that he understood that he was dealing with the corporation. We are of the opinion that the plaintiff did not prove his case; indeed, it seems reasonably clear that the plaintiff did not at any time understand that he was dealing with the corporation but understood that he was dealing with J. W. Brownlee and was looking to him for the payment of the account.

*Reversed and remanded.*

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BECKMAN *et al.* v. BOST.

[86 South. 713, No. 21705.]

**APPEAL AND ERROR.** *Amount of supersedeas bond on appeal from decree of sale to satisfy lien stated.*

Where a court decrees a sale of real estate to satisfy a lien established by the court to obtain an appeal with supersedeas, a bond is required in double the value of the property ordered sold, or in double the judgment rendered against the property, taking whichever is the smallest as a basis for the bond.

**APPEAL** from chancery court of Adams county.

HON. R. W. CUTLER, Chancellor.

Action by R. E. Bost against P. Beekman and others.  
Judgment for plaintiff, and defendants appeal. On mo-

tion to discharge *supersedeas* or require *supersedeas* bond in double the sum of the judgment. *Supersedeas* discharged unless bond in double amount of judgment given.

No brief of counsel found in the record.

ETHRIDGE, J., delivered the opinion of the court.

The appellants seek to appeal from a judgment in favor of Bost against them and the Rose Hill Baptist Church, the suit being one to condemn and sell property to satisfy a judgment against the Rose Hill Baptist Church, and the contention of the appellants is that the property was the property of the appellants and not of the Baptist Church.

The decreed from which the appeal is prosecuted is for two thousand three hundred twenty-five dollars, and the same is fixed by the decree of the court below as a charge upon the real estate which is worth five thousand dollars. The chancellor allowed a *supersedeas* on a bond in the sum of five hundred dollars, and this is a motion to discharge the *supersedeas* or to require the giving of the *supersedeas* bond in double the sum of the judgment appealed from which fixes the lien at two thousand three hundred twenty-five dollars.

The judgment having ordered the sale of the property, we think it requires a *supersedeas* bond of twice the value of either the judgment or the property, taking the lowest of these as being the one to be doubled in amount by the *supersedeas* bond. The motion will therefore be sustained and the *supersedeas* discharged, unless the appellants give a *supersedeas* appeal bond in double the sum of two thousand three hundred twenty-five dollars, or in the sum of four thousand six hundred fifty dollars, within ten days from this date.

*So ordered.*

## KYZAR v. STATE.

[87 South. 415, No. 21550.]

1. GRAND JURY. *Circuit court may during term reassemble grand jury after discharge when 15 or more of the original memers respond.*

The circuit court has power, during the term, to reassemble a grand jury after it has been discharged, under Code of 1906, § 2706 (Hemingway's Code, § 2199), authorizing the court in its discretion to adjourn the grand jury to a subsequent day of the term, and Code 1906, § 2718 (Hemingway's Code, § 2211), declaring the jury laws to be merely directory, and, under Code 1906, § 2700 (Hemingway's Code, § 2193), providing that a grand jury shall consist of not less than 15 members, when 15 or more of the original members of the body respond to the notice to reassemble and are present during its deliberations, the legality of any action of the reassembled grand jury is not affected by the absence of a particular member.

2. INDICTMENT AND INFORMATION. *After reassembly of grand jury during term. evidence that no witnesses appeared before it upon return of indictment held inadmissible.*

The court cannot inquire into the character of the evidence before the grand jury upon which an indictment was found, and when a grand jury has been reassembled during a term of court and has returned an indictment upon which the names of witnesses are indorsed, evidence to show that no witnesses appeared before the grand jury on the date it reconvened and returned the indictment is inadmissible.

3. INTOXICATING LIQUORS. *The Eighteenth Amendment and the Volstead Act do not supersede or abrogate the existing state prohibition law.*

Since the prohibition laws of the state of Mississippi do not in any respect contravene the essential and dominant purpose of the Eighteenth Amendment to the Constitution of the United States, and since the power exercised by the state under chapter 189, Laws of 1918, is in support of the main object of such amendment, the National Prohibition Act, commonly known as the Volstead Act, passed in pursuance of the Eighteenth Amend-

Brief for Appellant.

[125 Miss.]

ment to the Constitution of the United States, does not supersede or suspend the said chapter 189, Laws 1918, and the jurisdiction of the state courts to enforce the provisions of said chapter is not affected by the fact that Congress has legislated upon the subject of prohibition.

APPEAL from circuit court of Lincoln county.

HON. D. M. MILLER, Judge.

Tom Kyzar was convicted of manufacturing intoxicating liquors, and he appeals. Affirmed.

*Naul & Yawn*, for appellant.

A regular term of the circuit court of Lincoln county, was begun and held on the 6th day of September, A. D., 1920, and a grand jury of twenty good and lawful men were impaneled, and on a day prior to the 15th day of September, A. D. 1920, said grand jury made its final report to the court and was finally discharged. That the court attempted to reassemble said grand jury for the 15th of said month but no process for the reassembling of said jury was issued by the clerk, but in some way, the sheriff succeeded in getting some seventeen of said grand jurors reassembled, and said seventeen, without a single witness, and without a bailiff, on the said 15th day of September, returned into court the indictment herein. On these facts appellant filed his motion to quash and plea in abatement, and the evidence of the sheriff, clerk, and the statement of the court, shows that the above statement is correct. Surely the said seventeen men reassembled as aforesaid, without a bailiff or any evidence whatever, had no authority to return the indictment herein and said plea and motion should have been sustained, and said indictment abated or quashed. See *Haynes v. State*, 47 So. 522. In this case the same grand jury was reassembled. In the instant case, some of the jurors were not notified, and no effort made to notify the bailiff, Z. P. Jones.

In assignments fourteen and fifteen, the appellant contends that the circuit court of Lincoln county, Mississippi,

had no jurisdiction of the subject-matter involved. In other words that the state courts at this time have no jurisdiction of the subject-matter, because of the recent amendment to the constitution of the United States, with reference to the intoxicating drink proposition, and the recent act of the Congress for the enforcement of the liquor laws. That at this time the United States Government has the exclusive enforcement of said laws, and the state courts have no jurisdiction thereof. As a general principle when the United States courts take jurisdiction of a subject-matter its jurisdiction is exclusive.

The jurisdiction can be raised for the first time in the supreme court. The government of the United States having taken jurisdiction of the liquor question, its jurisdiction is exclusive, and superior to the jurisdiction of the state courts, and the laws of the state and the Federal Government are in conflict, and those of the state must give way to those of the United States.

*W. M. Hemingway*, for appellee.

The grand jury had been discharged at a prior date during the term of court. The court afterward directed the reassembling of the same grand jury and not the calling of a special grand jury. Seventeen were secured by the sheriff, appeared in court and answered to their names. Three of them were not notified by the sheriff to reappear. Twelve grand jurors must concur in an indictment; Code of 1906, section 1417; Hemingway's Code, section 1173.

It is not contended that twelve did not concur in this indictment. The grand jury must have not less than fifteen nor more than twenty in the discretion of the court. Section 2700, Code of 1906; section 2193, Hemingway's Code. There were more than fifteen on this grand jury and they found the indictment against the defendant. The indictment was properly returned in court with the names of the witnesses endorsed on the back. See page 1 of the transcript.

The Motion to Quash and the Plea in Abatement. The motion to quash and the plea in abatement are placed on the same grounds; if one falls, then the other must fall. The reasons for these two motions are set forth on pages four and five of the transcript. Six of them were given, among them being that the grand jury had been discharged; that the entire grand jury was not summoned to return; that the indictment was found without either evidence or witnesses. The court will note that this is the same grand jury that had been sitting. The points were not well taken. Under the Code of 1906, section 2706, Hemingway's Code, section 2199, the court has a right to adjourn the grand jury to subsequent dates of the term. That section is fully explained in *Haynes v. State*, 93 Miss. 670, 47 So. 522.

The Jury laws are merely directory. Code of 1906, section 2718, Hemingway's Code, section 2211. The fact that three of the jurors were absent did not make it a new body at all; it made it a body with absentees, but with enough members present to comply with the law.

A grand jury may bring in an indictment without having any witnesses before it. The members of the grand jury may have the evidence and it is not necessary to have witnesses. *Lee v. State*, 40 L. R. A. (N. S.) 1132. But there is no evidence here that there were no witnesses before the grand jury. The indictment shows that there were two, R. C. Applewhite and H. L. Hoskins.

Defendant's complaint is that the court refused to let him show that there was no evidence. As the indictment endorses the names of the two witnesses, this was an attempt to have the grand jury impeach their own return; but, under the *Lee* case that makes no difference. The finding of the grand jury is not conclusive. It doesn't convict. It is a basis for a legal trial, which was granted to this defendant. The clerk does show that the foreman of the grand jury secured subpoenas signed by him in blank. They may have been used in securing the witnesses whose names are on the indictment.

Amendment to the United States Constitution and the Volstead Act. Defendant contends that on account of the amendment to the United States Constitution and the Volstead Act that the state is not vested with power over the manufacture and sale of liquors. The amendment to the Federal Constitution gives both governments concurrent power. The manufacturer of liquor is prohibited by both. There is no conflict. Concurrent power cannot be construed to mean exclusive power. The state court has assumed jurisdiction, the Federal court has not. The state has this power. Section 2 of the Eighteenth Amendment reads: "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation. The state has enforced it by prohibiting it and providing the penalty and has clothed the courts with the power to act and they are exercising such power, but not exclusively. Our courts are accustomed to construe concurrent jurisdiction statutes. The constitutional amendment follows the same rule of construction."

Some attempt to make a distinction between concurrent jurisdiction and concurrent power. They may be construed as synonymous in this case. How can there be jurisdiction without some power? How can there be power unless there is something over which the jurisdiction may be exercised. Section 161, Mississippi Constitution, 1890, gives the chancery court and the circuit court concurrent jurisdiction over certain matters. That section has been construed by our court.

Chapter 134, Laws 1910, section 2, Hemingway's Code, section 2122, gives concurrent jurisdiction to the circuit court, and the chancery court over intoxicating liquor laws. This has been construed in *State v. Marshall*, 100 Miss. 626, 56 So. 792.

A giving of that power to the chancery court did not take it away from the circuit court. The state legislation and the Federal legislation concur in prohibiting the manufacture of intoxicating liquors. The court's attention is called to a brief filed by the attorneys for the Anti-Saloon

League. It is made a part of this brief and is filed herewith. A most interesting discussion of this amendment is found in the Harvard Law Review, Vol. 33, page 968.

The usual construction of Federal laws is where Congress has jurisdiction if it does not act, then the state may proceed to act, but where Congress assumes jurisdiction, then the state is deprived of jurisdiction. The Eighteenth Amendment shows on its face that it intended to depart from that rule because it gives concurrent power.

The attention of the court is called to the case of *Jones v. Hicks*, 104 S. E., a Georgia case, that holds the same as the Texas and Massachusetts courts cited in the brief of counsel for Anti-Saloon League.

W. H. Cook, J., delivered the opinion of the court.

Appellant, Tom Kyzar, was indicted by the grand jury of Lincoln county for the manufacture of intoxicating liquors, and was convicted and sentenced to imprisonment in the penitentiary for one year, from which verdict and sentence he prosecutes this appeal.

Appellant filed a motion to quash the indictment against him, alleging as the grounds of the motion that the grand jury had no authority or power to return the indictment; that the grand jury had been finally discharged by the court before the indictment was found; that the entire grand jury was not summoned to reassemble on the 15th day of September, 1920, the date the indictment was returned; that three of the grand jurors were not resummoned and did not meet with the body on the 15th day of September, 1920; that there was no evidence before the grand jury upon which the indictment was based; and that no witnesses appeared before them on the date the indictment was found and returned.

There was evidence offered on this motion, and it appears that after the grand jury was discharged, and during the term of court, the circuit judge issued an order reconvening the jury on the 15th day of September, 1920,

and directing the issuance of process for witnesses to appear before them. The grand jury as originally impaneled consisted of twenty members, but three of them were not notified of the order to reassemble, and on the date fixed by the order of the court only seventeen of them, including the foreman, appeared. It further appears that one of the three who were not resummoned had been excused from service by the court on account of illness, while the other two were not found in the county. The indictment against appellant as returned had indorsed thereon the names of the two witnesses, and appellant offered to introduce evidence to show that no witnesses appeared before the grand jury on the 15th day of September, 1920, the date they reassembled and returned the indictment against him. Upon objection this evidence was excluded and the motion to quash was overruled. Thereupon appellant filed a plea in abatement setting up the same grounds as were contained in the motion to quash, and the same evidence that had been offered on the motion was offered on the plea in abatement. The court also overruled the plea in abatement, the ruling of the court being in the following language:

"The court, having heard the evidence on the motion to quash, and also the same evidence on the plea in abatement, and considered the evidence and the answer of the state's attorney, as filed herein, is of the opinion that there is no legal ground to sustain the motion, and that there is no matter to be submitted to a jury to decide with reference to the plea in abatement, and is of opinion that the motion should be overruled, and is also of the opinion that the plea in abatement should not be sustained, and the court now so rules."

The action of the court both on the motion to quash and the plea in abatement was correct. Irrespective of any statutory authority, the court has the inherent power to recall the grand jury at any time during the term, and authority for this action by the court is also found in section 2706, Code of 1906 (Hemingway's Code, section 2199),

giving the court the power to adjourn the grand jury to a subsequent day of the term, and section 2718, Code of 1906 (Hemingway's Code, Section 2211), declaring that the jury laws are merely directory. The right of the court to reassemble the grand jury at any time during the term is not open to question in this state, as this question is settled in the case of *Hayes v. State*, 93 Miss. 670, 47 So. 522, 17 Ann. Cas. 653, and since the decision of that case it has become a common practice for the judge to recall the grand jury when, in his judgment, the public interest will be conserved by so doing. The power to reassemble the grand jury is of more importance now in the administration of the criminal laws than formerly on account of the greater length of the terms of court in many of the counties of the state, and the exercise of this power by the judges whenever the public exigency demands is to be commended. In the instant case the legality of the reassembled grand jury was not affected by the fact that only seventeen of them received the notice to reconvene. Section 2700 of the Code of 1906 (Hemingway's Code, section 2193) provides that the number of grand jurors shall not be less than fifteen nor more than twenty in the discretion of the court. The court has full power to excuse any member of a grand jury; the only limitation upon this power being that a grand jury shall never consist of less than fifteen members. It requires as many as fifteen members to constitute a grand jury, and so long as that number is present a defendant who is indicted by the body cannot complain of the absence of any particular member.

The testimony which appellant offered to show that no witness appeared before the grand jury on the date the indictment was returned was properly excluded. The court cannot inquire into the character or sufficiency of the evidence before the grand jury upon which an indictment was found, but, if the evidence offered in this case had been admissible, it would not have warranted a finding that there was no evidence before the grand jury upon

which to predicate their findings. *Smith v. State*, 61 Miss. 754; *Hammond v. State*, 74 Miss. 214, 21 So. 149.

In assignments fourteen and fifteen appellant contends that the laws of the State of Mississippi making the manufacture of intoxicating liquors a crime have been superseded or suspended by the adoption of the Eighteenth Amendment to the Constitution of the United States and the enactment of the national prohibition amendment thereunder, and that by reason of the fact that Congress, acting in pursuance of the power granted to it under the Constitution, has enacted legislation in regard to the manufacture, sale, transportation, importation, and exportation of intoxicating liquors, the subject is entirely removed from state jurisdiction.

The decision of this question is controlled by the opinion in the case of *Meriwether v. State*, No. 21431, 86 So. 411, this day decided by this court.

We do not think there is merit in any of the other assignments, and therefore this cause is affirmed.

*Affirmed.*

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BROWER *et al.* v. ROSENBAUM & LITTLE *et al.*

[87 South. 131, No. 21381.]

**PARTITION.** *Charging defendant's interest with fee of complainant's solicitor error.*

Where there is a real contest between the complainants and the defendants as to whether or not the complainants are entitled to maintain their suit, and the partition of the property is resisted in good faith by the defendants, the defendants are entitled to be represented by counsel of their own choice, and it is error to charge their interest with any part of the fee of the solicitor of the complainants.

APPEAL from chancery court of Lauderdale county.

HON. G. C. TANN, Chancellor.

Suit by Rosenbaum & Little and others against A. J. Brower and others, with cross-bill by defendants. Judgment for plaintiffs, and defendants appeal. Reversed, and judgment rendered for defendants.

*C. B. Cameron and John W. McCall*, for appellants.

*Baskin & Wilbourn, Ross A. Collins and R. M. Bordeaux*, for appellees.

No brief found in the record for counsel on either side.

SYKES, J., delivered the opinion of the court.

This appeal from a decree of the chancery court of Lauderdale county presents the sole question whether or not that court was correct in allowing a solicitor's fee for the appellees, complainants in the lower court, out of the proceeds of a sale of timber; the fee being taxed against the interests of all of the owners of the timber. This fee was allowed under section 3542, Code of 1906 (Hemingway's Code, section 2854).

In their bill the complainants claimed title to an undivided four-elevenths interest in the timber growing upon certain described lands in Lauderdale county, and that certain defendants by the name of Brower owned the other interest in the timber, and that the title to the lands was in the Browsers and the defendants, the two Smiths. The title of all the parties is deraigned in the bill. Complainants claim their title to the timber by virtue of a deed of conveyance from the two defendants, the Smiths. The prayer of the bill is to the effect that the complainants' interest be made available, that the timber on the lands be partited or sold for a division, or that the lands be partited and a four-elevenths interest be set aside to the two Smiths, regard being had to the rights of the com-

plainants in the entire timber, or that the lands, including the timber, be sold for a division of proceeds, and that the complainants receive a four-elevenths interest in the value of the timber, and also for a reasonable fee. General relief is then asked.

The defendants, the two Smiths, in a separate answer to the bill claimed that the deed from them to the complainants was procured through false and fraudulent representations, and specifically set out the facts which, if believed by the chancellor, would have sustained this allegation. By the answer they offered to return the purchase money paid them for their interest in the timber. The answer is also made a cross-bill, and then asks that the deed to the complainants be canceled upon their return of this purchase money.

The defendants, the Browers, in their separate answer to the bill denied any personal knowledge of the execution of the deed by the Smiths to the complainants. They aver that before the execution of the deed by the Smiths to the complainants all of the timber on these lands had been contracted for and sold to other parties, and that the papers were in process of preparation at the time of the alleged sale to the complainants, and that the complainants had notice of this fact. They alleged that a partition is not desired by the real owners, and that the complainants are without title to the timber, so they are informed, and are not entitled to the relief prayed for in the bill, and they ask that the relief prayed for by the complainant be denied.

The cause was heard upon bill, answer, and cross-bill of the two Smiths, and the answer of the defendants, the Browns, and testimony. The cross-bill was dismissed, the relief prayed for in the original bill was granted, and the timber was ordered sold for a division of the proceeds, and was sold. Upon motion the chancellor then allowed the solicitors of the complainants a fee of one thousand two hundred sixty dollars to be paid out of the entire proceeds of the sale.

It is contended by the appellees that there was no *bona-fide* contest between the complainants and the Browers, that there were no issues raised by the answer of the defendants the Browers, and consequently that the court was correct in charging their interest, as well as that of the complainants, with this fee. The sufficiency of the answer of the defendants, the Browers, was not challenged in the court below. No objection was in any wise raised to the sufficiency of this answer. Conceding that the answer was too vague and general, yet it denied the title of the complainants and denied that they were entitled to a partition or sale of the timber. The answer of the Smiths specifically denied the title of the complainants. In the introduction of the testimony the complainants assumed the burden of showing their title by introducing the deed record of the county wherein the deed to the complainants to this timber was recorded.

The defendants the Browers made common cause with their relatives, the Smiths, and several of the Browers testified as well as the Smiths, this testimony going to show that the complainants procured their deed by false and fraudulent representations. In other words, there was a *bona-fide* contest as to the title of the complainants in which all of these defendants joined. The Browers were interested in knowing who were their co-owners of this timber. They had the right to challenge the validity of the title of the complainants. If they failed to specifically challenge this title in their answer, the sufficiency of this answer could have been objected to, and, if the objections had been sustained, the court would have permitted them to amend. The cause was tried upon the theory that the answer sufficiently put in issue this title. There was a real contest as to complainants' title and whether or not he could maintain the bill. In order to protect their interests and ascertain who were the co-owners of this timber, and whether or not the timber alone should be sold, or the land together with the timber partited, the defendants were entitled to counsel to represent them. The in-

terests of the complainants and the defendants were antagonistic. This court has repeatedly construed section 3542, Code of 1906 (Hemingway's Code, section 2854).

In the case of *Hoffman v. Smith*, 61 Miss. 544, there was a contest between the complainants and the defendants. In this opinion, in referring to the statute, it is said that:

"It is designed particularly for cases in which some of the owners in common of land proceed for partition, and the proceeding, not resisted by others, is conducted by the solicitor of the complainant without any other solicitor being engaged in the cause. But it is not limited to those. The power to allow a reasonable solicitor's fee exists 'in all cases of the partition or sale of property for division of proceeds.' It should be exercised with caution, and be confined as nearly as possible to the class of cases for which it was designed; i. e., those in which there is no contest between the parties to the suit, and therefore no necessity for the defendants to have counsel of their own. If there is controversy between the parties and propriety in the defendants being represented in the cause by their own counsel, they should not be required to contribute to pay the counsel of their adversary and who antagonized their interest in the suit. To allow a fee to the solicitor of the complainant in such a state of case is an abuse of the discretion conferred by the statute."

In that case the court held that there was a real contest between the parties, waged in good faith, in which event it is not proper to allow as a common charge a fee to the solicitor of the complainant.

In the case at bar there was a real contest as to whether or not the complainants were the co-owners of the timber with the Browers, and whether or not they were entitled to maintain the suit. The defendants, the Browers, contested this title in good faith, and resisted a sale of the timber for a division of the proceeds. This being true, the court below erred in making this fee a common charge upon the entire proceeds derived from the sale of the timber. *Potts v. Gray*, 60 Miss. 57; *Neblett v. Neblett*, 70

Miss. 572, 12 So. 598; *Walker v. Williams*, 84 Miss. 392, 36 So. 450; *Liverman v. Lee*, 86 Miss. 370, 38 So. 658; *Bowles v. Wood*, 90 Miss. 742, 44 So. 169; *Hardy v. Richards*, 103 Miss. 548, 60 So. 643; *Carpenter v. Carpenter*, 104 Miss. 403, 61 So. 421; *Billingsley v. Billingsley*, 114 Miss. 702, 75 So. 547.

The decree of the court below is reversed, and the solicitor's fee charged against the interest of the defendants is disallowed.

Reversed, and judgment here for the defendants.

*Reversed.*

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YAZOO & M. V. R. Co. v. SUNFLOWER COUNTY.

[87 South. 417, No. 21434.]

1. RAILROADS. *Effect of consolidation on right of way over school section stated.*

When the Yazoo & Mississippi Valley Railroad Company created by the Laws of 1882, chapter 541, page 838, consolidated with the Louisville, New Orleans & Texas Railroad Company, the effect was to create a new corporation subject to the existing laws of state; and under section 211 of the state Constitution of 1890 the fee in the sixteenth section lands which had not then passed could not thereafter become vested in a corporation or an individual; and a right of way laid out after such consolidation, which occurred in October, 1892, over sixteenth section lands, did not vest any right or title to said sixteenth section lands under section 7 of the Charter of the original Yazoo & Mississippi Valley Railroad Company.

2. PUBLIC LANDS. *Railroad lessee of school section holding over after expiration of lease estopped to set up adverse claim.*

Where a railroad company, after the Constitution of 1890 went into operation, leased from a board of supervisors a right of way for a term of years, and under such lease constructed its right of way

and track across the sixteenth section lands held in trust by the state, and continued in possession after the expiration of its lease without giving notice of its intention to claim title and without surrendering possession of the said right of way, it cannot under such facts set up an adverse claim to the county's reversion and assert a hostile title.

APPEAL from chancery court of sunflower county.

HON. E. N. THOMAS, Chancellor.

Suit by Sunflower County against the Yazoo & Mississippi Valley Railroad Company. Decree for complainant, and defendant appeals. Affirmed.

*H. D. Minor, Charles N. Burch and Moody & Williams,*  
for appellants.

"Our position in this matter is that these lands are held in trust by the state for school purposes, and school purposes only, and that the legislature could not grant to the Yazoo & Mississippi Valley Railroad Company even if it had intended to do so by said charter." Brief for appellee, p. 4.

We wish briefly to answer this very clear statement of the appellee's contention. It will be borne in mind that we are not dealing with an attempted sale or grant of these school lands by some officer of the state, but with a grant made by the state itself through its sovereign legislature.

The legislature is subject to no limitation except such as may be found in the Constitution of the state in force in 1882 when the charter of appellant was granted. That the legislature had the power to make this grant is so clearly established by the case of *Jones v. Madison County*, 72 Miss. 777, that the only question is whether that case shall be overruled. The opinion in that case refers to prior cases and particularly *Hector v. Crisler*, 36 Miss. 681, and overrules those prior decisions declaring it to be the deliberate conclusion of the court that the legislature of the state did have the authority to convey these lands. The lease there before the court was for ninety-nine years

and the conclusion was announced that the lease was valid. Not only has *Jones v. Madison County* not been subsequently overruled, but the case has been referred to more than once and its correctness never doubted.

The same conclusion is announced in the case of *Cooper v. Roberts*, 18 How. (U. S.) 173; the brief of learned counsel speaks of the futility of citing decisions of the United States supreme court in reference to this case because such decisions are not controlling. It may be conceded, for the purpose of argument that the decisions of the Federal supreme court are not controlling, but certainly they remain valuable as precedents, being decisions by the highest judicial tribunal in the world.

It is claimed that the case of *Tynes v. Southern Pine Co.* (Miss.), 54 So. 885, is conclusive. That case has never been officially reported and the opinion is quite meagre. It has no application to the case at bar because the court was there dealing with the effect of the Constitution of 1868, section 6, article 8, which embraces merely lands now belonging to the state heretofore granted by the United States and land known as swamp lands.

As learned counsel points out at page five of his brief, it was decided in *Jones v. Madison County*, 72 Miss. 798, that the state's right in these sixteenth section lands does not arise from an Act of Congress, but from the act of cession by the state of Georgia in 1802. Therefore, these lands granted by the state of Georgia were not embraced in the provision of the Constitution of 1868 which the court had under consideration in the *Tynes case*, 54 So. 885. That case, therefore, does not directly or impliedly overrule the case of *Jones v. Madison County*, where this court squarely upheld the power of the state, through its legislature, to make a conveyance of these lands.

The quotation in appellee's brief, from 76 Miss. 495, that: "There never was in this state any legislative authority to sell in fee there lands, refers to authority from the legislature not in the legislature. For the court was

dealing with a sale by school trustees under claimed authority from the legislature.

We entirely agree that the state of Mississippi holds these sixteenth section lands under a sacred trust for the education of children of that community. But who is to determine whether this trust is properly administered or not. Has not that trust and its administration been vested entirely in the legislature of the state. Is argument necessary from us that the legislature may be trusted to administer this trust fairly and rightly? There is no court which has ever held that the judicial department may supervise and control the legislative department in matters of purely legislative administration. The fundamental basis of our Federal and all our state Constitutions is that there shall be three distinct departments of government, each independent of the other and each sovereign within its own field.

It is our view that it was not only the right, but the duty of the legislature in the administration of this trust, to do anything that would advance it. The legislature has the right in order to render a sixteenth section useful for any purpose, to dedicate public highways, across such as are reasonably necessary. Equally, the legislature has the right, in order to render the land more accessible, and therefore more useful and valuable, to grant an easement for a railroad over it. Such a grant is not an abuse of the trust, but an advancement of it. And even if we should concede the right of the court to supervise the action of the legislature, its action in thus developing this land should be approved.

*H. C. Mounger*, for appellee.

Our position in this matter is that these lands are held in trust by the state for school purposes, and school purposes only, and that the legislature could not grant to the Yazoo & Mississippi Valley Railroad Company, even if it had intended to do so by said charter.

This question has been authoritatively settled by the courts of this state by decisions too numerous to mention or to admit of controversy. *Lumber Company v. Harrison County*, 89 Miss. 571; *Jones v. Madison County*, 72 Miss. 798; *Gaines v. Nicholson*, 9 How. 365; *Sexton v. County*, 86 Miss. 385; *Jones v. Madison Co.*, 72 Miss. 792 (2 Par.), 18 So. 88.

We claim that the grant in the charter of the Yazoo & Mississippi Valley Railroad Company, if it was intended to grant any part of this sixteenth section, was absolutely void and beyond the power of the Mississippi legislature to make. All that could be done was to grant a seven years lease under the Acts of 1898, chapter 40, which has been brought forward into the Code of 1906, section 4700, except that the act as originally passed provided that lands in the sixteenth section should be leased for not longer than seven years, and it was under this provision that the board of supervisors granted the lease to the railroad company under which they entered. *Wright v. Lauderdale County*, 71 Miss. 804; *Robertson v. Monroe County*, 79 So. 185; *Weiler & Haas v. Monroe County*, 76 Miss. 492; *Morton v. Grenada Academy*, 8 Sm. & Marshall, 785.

In 32 Cyc., 868-869, it is stated that the Act of Congress intended the sixteenth section to be employed for the benefit of those who were to be educated in the townships. And in the case of the *State v. Cunningham*, 88 Wis. 81, it is held that the state could not set apart sixteenth section lands for a town park. 26 A. & E. Eng. L. (3 Ed.), 370.

We have argued this case so far as if there was an attempt on the part of the legislature to grant this land to the railroad and that the legislature did not have that power, even if it attempted to do so. But we further claim that there was no such intention on the part of the legislature and that it did not convey the sixteenth section lands. The charter itself grants a right of way for railroad purposes through state lands, Sec. 7, chapter 38. This did not embrace, *et seq.* and could not embrace, and

was not intended to embrace, sixteenth section lands. The legislature had no such idea in view and the terms of this charter does not include sixteenth section lands and cannot be stretched to include sixteenth section lands.

In answer to the bill the defendant sets up the statute of limitations. The statute of limitations does not run against the state as is held in *Weiler & Haas v. Monroe County*, 76 Miss. 495. Having entered under a lease, they have no right to set up adverse possession or an outstanding title against their landlord, without first surrendering possession. If there was any statute of limitations applicable to the case it would be the twenty-five year statute of limitations, which makes twenty-five years adverse possession simply *prima-facie* evidence of a lease, section 4699, Code of 1906; and the evidence shows that the defendant fell down on the proof of adverse possession.

The evidence shows, record page 26, that the railroad was built in 1898. Twenty-five years added to this would bring us to the year 1923, and this suit was started in 1919. The Code of 1880, section 732, provides how school lands may be leased and directs that said lands be leased to the highest bidder for the term of ninety-nine years on petition of a majority of the resident heads of families. This shows how the legislature regarded the use of the school lands and for what purposes they were reserved.

In the case of *Rabb v. Supervisors of Washington County*, 62 Miss. 593, the court says: "The land in controversy does not belong to Washington county. Like all sixteenth section land or land in lieu thereof reserved by Act of Congress for the support of schools in this state, it is trust property for the benefit of schools in the township in which it is situate, and it can be devoted to no other use or purpose. *Morton v. Grenada Academy*, 8 S. & M. 773; *Bishop v. McDonald*, 27 Miss. 371.

As settling this case conclusively, we refer the court to the case of *Hynes v. Southern Pine Company* (Miss.), 54 So. 885, in which the question was as to the validity of a legislative grant to the Pearl River Improvement and

Navigation Company of land set apart for school purposes, in which said grant was held invalid and beyond the power of the legislature. In this case the court said: "In view of section 6, article 8 of the Constitution of Mississippi of 1868, which provides, that there shall be established a common school fund, which shall consist of the proceeds of the lands now belonging to the state, heretofore granted by the United States, and of the land known as swamp lands, except the swamp lands lying and situated on Pearl River, in the counties, of Hancock, Marion, Lawrence, Simpson and Copiah," etc. The Act of 1871 could not authorize the issuance of patents to the Pearl River Navigation Company of the land which is in controversy in this suit. The bill itself shows that the lands are not on Pearl river, and the language of the bill is even broader than this, in that the bill expressly states that the land is neither on nor near Pearl River. No act passed by the legislature, in view of the article of the constitution above referred to, could donate to anybody for any purposes, land situated as was this land. *Presly, Superintendent, v. Ellis, et al.*, 48 Miss. at bottom of page 578.

Counsel cites the case of *Cooper v. Roberts*, 18 Howard 173, which we claim is not applicable by reason of the fact that in the case first cited, *Jones v. Madison County*, 72 Miss. 798, the court says: "Beginning with the postulate that these lands belong to the United States, to be dealt with at its will, and therefore that the right of the inhabitants of the township sprang from a donation by Congress, the conclusion that the state had only such power as had been given by Congress would be a correct one. The mistake in the conclusion arises from the fact that the postulate is erroneous. The right of the inhabitants of the township to have the lands for school purposes arises, not from the Act of Congress but from the act of cession by the state of Georgia, 1802. The state, and not the United States, is the donor. The United States never had the shadow of a right to these lands, save as trustee for the inhabitants of the prospective states which the act

itself stipulated should be created." And our own decisions are the ones that govern these questions.

Further, in *Cooper v. Roberts*, the question was whether a lease made by the secretary of the sixteenth section could defeat the claim of the state for school lands. The question was which of two claimants had title, one claiming under the state of Michigan as school lands or the other party, claiming under the secretary of the treasury. It was held that this sixteenth section was school lands and the secretary of the treasury had no right to dispose of the same. The court winds up by saying something very significant: "Michigan has not complained of the sale, and retained, so far as the case shows, the price paid for it. Under these circumstances we must regard the patent as conclusive of the fact of a valid and regular sale on this issue." In this case the state is complainant and is complaining of the gift or grant and is not retaining any price paid for it.

In the case of *Board v. East Miss. Mills*, 18 So. 194, the question was simply as to the validity of a lease. It was not the case of a sale or a grant in fee simple. In the case which counsel quotes, *Robertson v. Monroe County*, 118 Miss. 536, the court says: "Has the state power to bring suit in this case. In the case of *Jones v. Madison County*, 72 Miss. 777, 17 So. 87, this court held as under the law that the state was the owner of the sixteenth section lands in trust for the inhabitants of the several townships, the state is therefore a trustee, and the management of the sixteenth section lands for the purpose of carrying out the grant of the state of Georgia is a trust over which the state, as trustee, has control, and the subject of trust is a familiar ground of equity jurisdiction.

"We think in this case that the state had the right to bring the suit as trustee, and that the equity court had jurisdiction over the subject-matter, because it was a trust." Section 211 of the Constitution of 1890, was merely declaratory of what the law already was and was intended to provide that the true condition of the title to the

sixteenth section lands in this state should be looked into and cleared up.

In conclusion, we would recapitulate that this sixteenth section was donated to the state of Mississippi by the state of Georgia in trust for school purposes, that it could be used no other way and could not be diverted from this purpose; that the legislature could not by a grant to the railroad, give this land to the railroad for railroad purposes; that the legislature did not so intend by the grant, because the terms of the grant did not and could not include school lands; that after this grant the railroad did not rely upon it, but complied with the then existing law on the subject and leased said land for a term of seven years; that it cannot now come in under these circumstances and set up an outstanding title without surrendering possession to the county; that the lease has long since expired and that the county is entitled to the possession of said lands.

In regard to the question of the very moderate sum which the county was allowed for rents, we would refer the court to the testimony of W. P. Sanders, Record page 17 et seq., and the testimony of J. S. Watson, Record page 25 et seq.

We insist that there was a breach of trust on the part of the legislature in donating this land to the railroad if in fact it did donate the land to the railroad, and that the judgment should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

Sunflower county brought a suit to cancel a claim of the appellant to section 16, township 23 north, range 3 west, alleging that said lands were school lands donated by the state of Georgia for the benefit of the inhabitants of the several townships, and, when Mississippi was admitted as a state, that the title and control of the section vested in the state in trust for the inhabitants of the townships for the support of schools within the township; that the railroad company was in possession of a strip of land one hun-

dred feet wide through the said section, being fifty feet on each side of its track extending entirely through the section in a northerly and southerly direction, and that the railroad company claims title in fee simple to the said land, and that such possession and claim casts a cloud upon the title to said land, and prayed for the rents on said strip, it being alleged that the railroad company had been in possession for several years, and for the cancellation of the title and for an accounting.

The railroad company filed an answer denying the right of cancellation and asserting title, as an easement over said land, by reason of a grant contained in the charter granted by the legislature on February 17, 1882, to the Yazoo & Mississippi Valley Railroad Company. It also pleaded that it had been in possession of the said land more than twenty-five years prior to the filing of the suit and pleaded the statute of limitations in support of its right and in bar of the county's right; and asserts that by reason of the act of the legislature of 1882, Laws of Mississippi of 1882, section 7, p. 845, it was granted a title to the land in controversy.

The complainant, the county, introduced in evidence an order of the board of supervisors directing the suit to be brought and also a minute of the board of supervisors of said county at the July 1898 term, in the following words:

"Upon the application of the Yazoo & Mississippi Valley Railroad Company for a right of way one hundred feet wide, across section 16, township 23, range 3 west, in Sunflower county, Miss., and the board having considered the same, it is therefore ordered that the said application be and the same is hereby granted, and the president of this board is hereby authorized and directed to execute to said railroad a deed conveying to said railroad a right of way across said land one hundred feet wide, for a term of seven years from this date, but no longer."

It also introduced a lease dated July 4, 1898, signed by John R. Baird, president of the board of supervisors, which reads as follows:

"In consideration of one dollar in hand paid and the benefits of having a railroad built across the hereinafter described land, within one year from date, I convey and warrant to the Yazoo & Mississippi Valley Railroad Company, its successors and assigns, for a term of seven years from this date, for the purpose of a railroad right of way, the land described as follows:

"A strip of land one hundred feet wide (100), being fifty (50) feet on each side of the center line of the railroad as surveyed and located across the land in said county and state, to wit:

"Section 16, township 23, range 3 west, Sunflower county, Miss., hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state in or to any part of the land above conveyed and all rights of dower therein."

The railroad track across the land in question was constructed in 1898, and after the expiration of the seven years stipulated for in the lease the railroad company continued in possession without paying further rents or securing further rights, and afterwards set up claim as presented in the present suit.

The present Yazoo & Mississippi Valley Railroad Company came into being as a corporation on the 24th day of October, 1892, by the consolidation of the Louisville, New Orleans & Texas Railroad Company and the Yazoo & Mississippi Valley Railroad Company, which latter company was incorporated by the Act of 1882 herein referred to.

It was held by this court in the suit of *Adams, State Revenue Agent, v. Y. & M. V. Railroad Co.*, 77 Miss. 194, 24 So. 200, 60 L. R. A. 33, that the effect of the consolidation of the two railroad companies was to create a new corporation whose powers and rights were measured by the articles of consolidation and the laws in force at the time of the consolidation. In the beginning of the opinion in that case the court said:

"The question which lies at the foundation of this case is this: Conceding for argument's sake that the L., N. O.

& T. R. R. Co. had an exemption from taxation, did the consolidation of that railroad with the Yazoo & Mississippi Valley Railroad Company on October 24, 1892, create a new corporation, as of that date, and thus result in the cutting off of said exemption by section 180 of the Constitution of 1890? If this question be answered in the affirmative, then, obviously, the contention of the state must prevail throughout, without regard to any other questions in the case. The power to consolidate must be granted by the state, and permission to consolidate, so granted, is not a contract, but a mere license. 6 Am. & Eng. Enc. L. (2 Ed.), p. 802; *Pearsall v. G. N. Ry. Co.*, 161 U. S. 667; *Louisville, etc., Railroad Co. v. Kentucky*, 161 U. S. 695; *Keokuk, etc., Railroad Co. v. Missouri*, 152 U. S. 312. . .

"Let us inquire, then, what the effect of this consolidation was; and, first, what railroads entered into this consolidation? The L., N. O. & T. R. R. Co. and the Y. & M. V. R. R. Co. What was the L., N. O. & T. R. R. Co.? It is described in the 'Articles of Consolidation' as the 'Louisville, New Orleans & Texas Railway Company, a corporation of the states of Tennessee, Mississippi, and Louisiana of the first part;' and it is further expressly declared in said articles that the consolidation is effected 'under and by virtue of the charters of the respective states of Tennessee, Mississippi, and Louisiana, in such case made and provided,' etc. The two ends of this railroad are in Louisiana and Tennessee. Now, what are the laws touching consolidation in these states, 'in such case made and provided?' Of course we deal here exclusively with the Mississippi corporation under our laws; but the laws of Louisiana and Tennessee are expressly referred to as having been held in mind in effecting this consolidation, and they will materially aid us in solving this question. The road, with all its property, was a unit in the three states. If the effect of the consolidation in Tennessee and Louisiana was known necessarily to be the creation of a new corporation, it hardly comports with reason to suppose that any different consolidation would have been sought at the

hands of the Mississippi legislature or granted by it, if sought; and so we shall find it to be."

The court then proceeded in an elaborate opinion to consider the provisions of the articles of consolidation and the law bearing upon the consolidation, and reached the conclusion that the articles of consolidation created a new charter subject to the provisions of the Constitution of 1890 and other laws of the state in force at the time of the consolidation.

An appeal was taken from the judgment of this court to the United States supreme court in which it was contended that the construction placed upon the charters of the railroad companies, to the effect that the "Articles of Consolidation" constituted a new corporation subject to existing laws, was an impairment of the obligations of the contract within the prohibition of the federal Constitution, and that court entertained jurisdiction, and upheld the view of the Mississippi supreme court that the effect of the consolidation was to create a new corporation. In discussing this feature of the case the United States supreme court said:

"At the foundation of the right to a reversal of this case is the question whether, conceding the validity of the exemption or commutation provision contained in the twenty-first section of the Mobile Company's charter of July 21, 1870, such exemption enured to the plaintiffs in error under their successive consolidations. It will be borne in mind that the existing Constitution of Mississippi was adopted November 1, 1890; that the present Yazoo Company was formed October 24, 1892 (nearly two years after the adoption of the Constitution), by the consolidation of the original Yazoo Company with the Louisville Company. By the act of August 8, 1870, the exemption contained in the twenty-first section of the Mobile charter was extended to the Memphis & Vicksburg Railroad, which was chartered the same day. This charter gave it power to consolidate its stock, property, and franchise with any other road upon such terms as might be consistent with the powers

conferred upon the company. Twelve years thereafter, March 9, 1882, the Baton Rouge Company was incorporated with power to consolidate with any other company, and on March 3, 1882, the Memphis & Vicksburg Company was also authorized to consolidate. The same power had already been extended, February 17, 1882, to the Yazoo Company.

"It is unnecessary to discuss the terms of the first consolidation of August 12, 1884, between the Tennessee Southern, the Memphis Company, the Baton Rouge Company, and the New Orleans Company, forming the Louisville, New Orleans & Texas Company, since this was made prior to the adoption of the New Constitution of 1890. We are specially concerned with the articles of consolidation between the Louisville Company so organized, and the Yazoo Company, which were adopted October 24, 1892, and subsequent to the New Constitution. The question in that connection is whether such consolidation created a new corporation, or, in the language of section 180 of the Constitution of 1890, whether it was a 'grant of corporate franchises,' in which case, by the express language of that section, such new corporation became subject to the provision of the new Constitution. In their articles of consolidation these companies agreed 'to and with each other, to unite, merge, and consolidate their several capital stocks, corporate rights, franchises, immunities, and privileges, and properties of every kind, real, personal. and mixed.' The first article provided that 'such consolidation shall be effected by uniting or merging the stock, property, and franchises of the party of the first part (the Louisville Company) with and into the stock, property. and franchises of the said the Yazoo & Mississippi Valley Railroad Company, without disturbing the corporate existence of the last-named company, or the formation of any new, distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but, whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective.'

This article was evidently drawn in view of the decisions of this court upon the subject of merger and consolidation, and evinces a desire to avoid the legal results following from a consolidation of the two constituent companies into a new corporation, but, at the same time, expresses a doubt whether the agreement would not after all be construed to create a new corporation. These doubts were unquestionably well founded, and, if the effect of the agreement be in law the creation of a new corporation, the expression of a wish that it should not be so construed is of course entitled to no weight. The final clause, that in any event the agreement shall stand and be effective, shows that effect should be given to all its stipulations, whatever be its legal consequences.

"Subsequent articles provided that the corporate name should be the Yazoo & Mississippi Valley Railway Company; that the capital stock should be fifteen million dollars; that the stockholders of either of the constituent companies should 'have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor; and, in case the consolidated company shall determine to issue new shares, such shares shall be exchangeable at par for the new outstanding shares of each of the constituent companies;' that all the rights, powers, privileges, immunities, and franchises of the constituent companies should pass to the consolidated company, which should be managed by a board of directors, whose names, for the purpose of the organization, were given.

"Reading this agreement in connection with the charters of the several companies, and especially with that of the Memphis & Vicksburg Railroad Company of March 3, 1882, providing that 'all of the companies so consolidating shall be merged into and become one company, and the company so formed by such consolidation shall be deemed and held to be a corporation created by the laws of this state,' it is impossible to escape the conclusion that a new corporation was created with a capital stock of fifteen million

dollars, and that the stockholders of the constituent companies were to become stockholders of the new company, share for share, 'as fully as if new shares of the consolidated company had been issued and exchanged therefor.' Some question was made in the state courts whether the shares were actually issued in the new company. But the supreme court having found that they were, we accept that finding as conclusive. Power was expressly given to issue new shares, and the usual course of business would justify us in inferring that that was the method adopted. A new name was taken, which was none the less a new one by reason of the fact that it was the name of one of the constituent companies.

"It cannot be doubted that under this agreement that it was contemplated that the constituent companies should go out of existence, and that their officers should resign their trusts in favor of the officers of the new company; that their boards of directors should be supplanted by another board, the names of whose members were contained in the agreement; that the stock of the constituent companies should be surrendered and new stock taken therefor, or, in lieu of that, that the old stock should be recognized as the stock of the new company; that the road should be operated by men holding their commissions from the new company, and that the entire administration of the functions of the constituent companies should be surrendered to the new corporation. In short, nothing was left of the constituent companies but the memory of their existence—the mere shadow of a name. But the new company which took its place suddenly sprang into life with a new corps of officers and a full equipment for the successful operation of the road." 180 U. S. 16, 21 Sup. Ct. 245, 45 L. Ed. 405.

It follows from these decisions that the question now presented for consideration is whether section 7, chapter 541, Laws of 1882, granted to the railroad company *in presenti* full title to the land involved here, or whether under the provisions of that section the title only passed

from the state to the railroad company when the right of way was laid out, located, or construed over the land. The pertinent part of this section reads as follows:

"That the right of way is hereby granted said company to pass in and through the state of Mississippi, with said railroads, branches, spurs and laterals aforesaid, and to enter upon and use all lands, rocks, timber, earth, sand, gravel, water or other materials, which may be found on the routes selected, and which may belong to the state of Mississippi, and be convenient or necessary for the use of said railroads; and wherever said railroads or the branches, spurs or laterals aforesaid are located, over any lands belonging to this state, the title in fee simple, to one hundred feet on each side of the center of said railroad track or tracks shall vest in said company, its successors and assigns," etc.

It will be noted that this language provides that the title in fee simple is to vest wherever said railroad or the branches, spurs, or laterals aforesaid are located over any lands belonging to this state. The act does not describe any particular lands, nor does it give any description of the lands which are granted, but merely undertakes to grant a right of way through any lands belonging to the state, and to grant the right to use the material upon such land for the use of the railroad on the route selected by the railroad company over lands which belonged to the state of Mississippi. Necessarily the right of way had to be located in order for the title to vest in the grantee under the peculiar phraseology of this act, otherwise the state would have granted to this one railroad company title in fee to any and all public land which the state may have owned, or else the grant would have been void for uncertainty of description.

We think it was the purpose of the legislature to grant the right of way only when the right of way was located and until that was done the railroad company did not acquire any title to the land.

Inasmuch as the right of way was not located prior to the consolidation (which consolidation created a new corporation subject to all the laws in force at the time of the consolidation), the title did not pass because two provisions of the state Constitution operated to prohibit a grant of lands belonging to the state at that time. Section 211 of the Constitution of Mississippi of 1890 prohibits the sale of these particular lands. This section in full reads as follows:

"The legislature shall enact such laws as may be necessary to ascertain the true condition of the title to the sixteenth section lands in this state, or lands granted in lieu thereof, in the Choctaw purchase, and shall provide that the sixteenth section lands reserved for the support of township schools shall not be sold, nor shall they be leased for a longer term than ten years for a gross sum; but the legislature may provide for the lease of any of said lands for a term not exceeding twenty-five years for a ground rental, payable annually; and, in case of uncleared lands, may lease them for such short term as may be deemed proper in consideration of the improvement thereof, with right thereafter to lease for a term or to hold on payment of ground rent."

Section 95 of the Constitution of 1890 reads as follows:

"Lands belonging to, or under the control of the state, shall never be donated, directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such land be sold to corporations or associations for a less price than that for which it is subject to sale to individuals. This, however, shall not prevent the legislature from granting a right of way, not exceeding one hundred feet in width, as a mere easement, to railroads across state land, and the legislature shall never dispose of the land covered by said right of way so long as such easement exists."

So that the legislature at the time could not have conferred upon a railroad corporation a grant in fee simple

of the right of way over the land. It is unnecessary here to decide whether the act of 1882 would apply to sixteenth section lands held in trust, or whether it would be limited to lands owned outright.

The railroad company at the time it entered this section of land did not understand the laws to be what it now contends it is, because it applied to the board of supervisors for a right of way and, in consideration for a lease for seven years, built its tracks through the said section. Under the law in force at that time all that it could acquire was a leasehold right of way for a definite limited term, and upon this lease it entered the land and laid out its right of way and constructed its roadbed and track. Under this lease the county could not disturb it or prevent the construction of a track or take any proceeding to cause it to be removed until the expiration of the term of the lease.

It is contended by the appellant that it is not estopped from setting up title in contravention of this lease under the decision of *Jones v. Madison County*, 72 Miss. 777, 18 So. 87. The court in discussing this principle in that case said:

"The principle is that, when the lessee has paid for the term, he owes no duty to his landlord, except not to dispute his title to the reversion. The term then becomes the property of the tenant, and, in defense of that, he may fight the landlord 'tooth and nail,' as he may a stranger. He may use any weapon he may find in his arsenal in defense of his term. If the statute of limitations is available, he may shelter behind that; if it is not, he may resort to any defense which does not controvert the reversionary right of the landlord nor violate the terms of his own contract. It is true the statute of limitations, as against the county's title, cannot now be invoked; but when the law was that it could be, its effect was that the defendant had acquired that title by adverse possession. Title of the county derived from the statute is not pleaded by the defendant. He shows that the county had

no title, but that it was in the heirs of Hill, and that this title he has acquired by limitation."

In this case the county is not seeking to repudiate the lease, and it cannot repudiate the lease because it had the power to make the lease and acting upon the lease the railroad company constructed its property across the land. Having continued in possession after its lease expired, it is subject to the claim by the county for the reasonable value for the use of the right of way for the years subsequent to the expiration of the lease, and the chancellor's finding as to the value of the use of the right of way is supported by the evidence, and his judgment will be affirmed.

*Affirmed.*

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MOCK v. HINES, *Director General.*

[87 South. 423, No. 21463.]

**TRIAL.** *Party suing for blocking of crossing cannot testify to length of blocking in rebuttal.*

Where a suit for personal injury is predicated upon blocking a crossing for more than the statutory period, and the plaintiff testifies as to the injury and introduces an ordinance prohibiting the blocking of a street crossing for more than five minutes, but fails to testify in his chief examination that the crossing was blocked longer than five minutes, he is not entitled to testify to such fact in rebuttal by reason of section 1985, Code of 1906 (Hemingway's Code, section 1645).

APPEAL from circuit court of Tishomingo county.

HON. C. P. LONG, Judge.

Action by N. B. Mock against Walker D. Hines, Director General (Illinois Central Railroad Company). From a judgment for defendant, plaintiff appeals. Affirmed.

*J. A. Cunningham*, for appellant.

In March, 1917, the appellant sought to pass from one side of the public street to the other in the village of Holcut, Mississippi, which had an ordinance against blocking the highway by railroad cars for longer than five minutes at any one time. His evidence tends to show that the railroad company stopped its train over the highway and remained there for considerably over five minutes; some making it even as much as twelve or fifteen minutes, and that appellant was actually detained this length of time by the said wrongful blocking. At the end of this time he undertook to pass over the bumpers between the cars, after exercising care to see that no efforts were made to start the train. The train did, however, suddenly start, catch and crush one of appellant's feet, and did injure him severely.

He brought his suit and demanded judgment of the defendant company for the amount of his injuries. and on the trial of this cause in the circuit court of Tishomingo county, Mississippi, August Term, 1918, he merely proceeded to show his injury by a moving train and the extent of his damage, and then closed as was his right to do under section 1645, Hemingway's Code 1917.

The appellee railroad company then proceeded to exonerate itself by offering proof which tended to show that they did not block the road for an unlawful or unreasonable length of time, and were not negligent in any way, and thereupon closed their defense. Then to rebut this evidence offered by the appellees, the appellant offered the witness Preslay Nixon to prove that the company did block the highway for some ten or twelve minutes, and offered the witnesses Felker, McAnally, Mock and others to prove the same matters to rebut the defense of the railroad, but for some cause not warranted by good procedure, the trial judge excluded all this evidence and directed a verdict for the defendant, the appellee, here.

The law was pronounced by the above statute, and the citations of authorities thereunder requires nothing, as we construe it and understand it, of a plaintiff than to show actual injury and damage by a running train, and his case is made up and nothing more required of him. The plaintiff took this course in the trial of this cause, which is the regular course in the generally accepted method of procedure under our observation, since we have had such a statute.

Then it was up to the defendant railroad company to exonerate itself, and when it had proceeded and closed, then the plaintiff has a right to rebut and contradict such a defense by competent proof, and is not required as the learned judge says to offer all his proof in chief.

To support this view, we cite, Sec. 1645, Hemingway's Code 1917, as cited above with authority thereunder; and we cannot understand how this court can afford to allow such a vital error of procedure to contravene and defeat the proper and well established method followed by the appellant.

The appellant was not called upon to anticipate any of the railroad's defense, and, while they cross-examined appellant's witnesses in chief as to some of these propositions that of itself required nothing of the appellant until it became necessary to rebut the defendant's proof.

To cut this off was fatal error, and the cause should be reversed and the proof heard. The learned judge should not have granted a peremptory instruction because some of the evidence developed by them on cross-examination of M. B. Mock and others, tended to show that the railroad company was violating the law at the time appellant was injured, and that such violation contributed proximately to his injury. When the company had blocked this highway for a period of more than five minutes, then it became a trespasser and was wrongfully blocking the highway, and this appellant had a right to pass over the bumpers between the cars to his place of business, and this is what he did do.

And there was some question as to whether or not he climbed over right at the highway. This is immaterial. The highway was blocked, and he had a right to cross over either on the highway, or off of it. *So. Ry. Co. v. Floyd*, 53 Rep. 287; *Jarrill v. New Orleans & Northeastern R. R. Co.*, 67 So. 659.

Under the above authority, the appellant had a right, according to some of the evidence in this record, to attempt to cross over, and notwithstanding it may have been negligence to do so, yet this question could have been properly settled and the respective blames balanced up under the modern rule of comparative negligence. This young man suffered a very severe injury, having his foot crushed, suffering great physical and mental pains, and losing much time; and in fact, was permanently injured and we most earnestly insist that the cause ought to be reversed with directions to the court below to allow the cause proceeded with in a proper way.

*Wells, May & Saunders*, for appellee.

If we have correctly interpreted the evidence shown by the record, there is no ground for complaint of the court's action in giving a peremptory instruction for the defendant, and equally certain it is there is none for the court's action in refusing to re-open the case to permit plaintiff to introduce other evidence as to the length of time that the crossing was blocked. The action of the court in refusing this evidence was not erroneous for two reasons; in the first place, it was not rebuttal evidence, and in the second place, such evidence would not have altered the result, since, by all the uncontradicted evidence in the case, the plaintiff's injury proximately resulted from his own reckless negligence and was not caused by any negligence of the railroad company. The railroad company had the right, and in fact it was its duty to move the train off the crossing, and when the appellant, without justification and without the knowledge of the train's employees, placed

himself in a position where he would be hurt by the lawful movement of the train, he took upon himself the consequence of his own reckless act.

We respectfully submit that the judgment of the court below ought to be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

The appellant was plaintiff below and filed suit for a personal injury. The injury was caused by the appellant's undertaking to cross a train in the village of Paden, and while passing across the train, which train was standing across the street or crossing, a movement of the train caused the injury to plaintiff's foot.

The appellant introduced an ordinance of the village prohibiting the blocking of the crossings in a municipality for a longer period than five minutes, and then took the stand in person and testified as to the fact of the train blocking the crossing and his undertaking to cross over the train and as to his injury. The appellant also introduced other testimony as to his injury. He did not testify as to the time that the train had been standing on the crossing when he attempted to cross the train. After he closed his case the defendant introduced evidence to show that the train had only stopped from one to two minutes at the time of the injury. At the conclusion of the defendant's evidence plaintiff offered himself and other witnesses to prove that the crossing had been blocked by the train more than five minutes, but the judge excluded such evidence on the ground that it should have been introduced in chief and then granted a peremptory instruction for the defendant, on which a judgment was entered, and from the said judgment this appeal is prosecuted.

The appellant insists that it was error to reject this evidence, as all that he was called upon to prove in chief was the injury by the train to himself under section 1985, Code of 1906 (Hemingway's Code, section 1645). The plaintiff's right to recover rests upon the fact that the crossing

was blocked for a longer period than five minutes, and he testified as to the facts other than the time in his evidence in chief.

We think to recover on these facts the plaintiff must prove the blocking of the crossing for more than five minutes, and, as he testified in chief, he should have at that time disclosed these facts within his knowledge.

Under the facts of this case we think the circuit judge had a right to exclude this evidence, offered in rebuttal when it should have been offered in chief, and the judgment will be affirmed.

*Affirmed.*

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McLAUGHLIN v. R. W. FAGAN-PEEL CO. *et al.*

[87 South. 471, No. 21243.]

**APPEAL AND ERROR.** *Damages for loss of arm held grossly inadequate; where damages inadequate; judgment will be reversed only as to amount.*

Where, in a suit for damages by a laborer against his employer, the jury found that the injury was the result of the negligence of defendants, the verdict of the jury awarding plaintiff the sum of three hundred dollars as compensation for his suffering and for the loss of an arm is grossly inadequate, and the court on appeal will reverse the judgment of the lower court in so far as it adjudges the amount of damages to be recovered, but will allow the judgment as to liability to stand.

APPEAL from circuit court of Wayne county.

HON. R. W. HEIDELBERG, Judge.

Action by Willie McLaughlin, by his next friend, against R. W. Fagan-Peel Company and others. From a judgment for plaintiff for less than claimed, he appeals. Reversed and remanded.

*M. V. B. Miller*, for appellant.

The damages were grossly inadequate. This court, in speaking through Judge Woods in *Mosely v. Jamison*, 8 So. 744, has so clearly expressed itself on the inadequacy of damages and has done so much better than counsel can hope to, that I am setting out the language of Judge Woods in this opinion. Judge Woods said as follows: "But granting all this, a new trial must be granted even in actions *ex delicto*, where the jury has responded only in part to the demand made upon it by the law and the evidence. The plaintiff in such action seems to establish his right to a recovery for injuries done by the defendant, and to recover adequate compensation for the wrongs. An appeal to the courts of the country which is met by a verdict declaring that the plaintiff's right to a recovery is clear, but declining to give adequate compensatory damages, has certainly not met the response which justice requires. The aggrieved suitor has asked for, and shown that he was entitled to receive, bread, but has been given a stone. He has made out his right to recovery for the wrong done him, and he has a right to expect and to demand adequate compensatory damages, if nothing more. He has furnished the jury with a certain standard for estimating his damages, and the jury is not to be permitted wantonly, and defiantly to disregard this certain standard in arriving at its conclusion. The right to adequate compensation is as fixed as the right to a recovery itself. In the case at bar the jury has said that the plaintiff's right to a recovery is so clearly made out as to constrain a verdict for him. The same evidence by which the plaintiff made out his right to a recovery shows further, and undisputably, that considerable sums were expended by him for medical attention and supplies, and that for months he was wholly disabled for business, and the precise sum lost by his disablement was not attempted to be disputed. That the injured suitor shall be told, "You are clearly entitled to recover, that is your right, and you have shown what amount

of damage you have actually sustained by reason of the wrongs which gave you a right to recovery, but we will compromise the matter by saying you were wronged, and shall recover, whereby you shall have the benefit of the moral victory, but we will decline the mercenary and low view that money can salve your hurts, and saddle the costs of the suit upon you," must shock every reflecting and law-abiding man, when attentively regarded. The verdict is utterly inconsistent, and unreasonable and unjust, and must be set aside by us. The injured citizen must be made to realize that he can safely appeal to the courts of the state for adequate redress of every wrong, and no appeal shall ever be met by such response as will only aggravate and intensify the original injury, with our consent at least. Reversed and remanded. *Scott v. Y. & M. V. R. R. Co.*, 103 Miss. 522, 60 So. 215; *Whitehead v. The Newton Cotton Oil Co.*, 105 Miss. 711, 63 So. 219; *Murphy v. Town of Cleveland*, 106 Miss. 269, 63 So. 572; *White v. McRee*, 71 So. 804; *Townsend v. Briggs*, 88 Calif. 230, 26 Pac. 108; *Sullivan v. Vicksburg R. R. Co.*, 39 La. 800, 2 So. 586; *Richardson v. Missouri Fire Brick Co.*, 122 Mo. App. 529, 99 S. W. 778; *Warner v. Tolbert*, 112 La. 817, 36 So. 743; *Pinkerton v. Wisconsin Steel Co.*, 109 Minn. 117, 123 N. W. 60; *E. C. Noyes v. Des Moines Club*, 170 N. W. 461; *L. & N. v. Williams*, 183 Ala. 138, 62 So. 679, 3 A. L. R. 610 (Annotations and Notes); *McDonald v. Walter*, 40 N. Y. 551; *Walker v. Nix*, 76 So. 143, 115 Miss. 199.

In the case at bar, we have a little fifteen-year-old negro placed at work by the master around dangerous machinery in strict violation of the law of the land. This little negro was inexperienced in the line of work he was required to perform and was not warned of the dangers and hazards incident to such employment and we verily believe was not of such mature age as to be able to appreciate the dangers of such employment or understand the warning, if any had been given. He was of sound health and earning one dollar and seventy-five cents per day. Then for a jury who

have said that the master is liable, to say that one having his right arm torn and lacerated from the finger tips to above the elbow, having to wait seven or eight hours after the injury before his arm was finally amputated—to say that one who suffered the pain that this little negro must have suffered, the jury also well knowing that he lost his right arm and that his earning capacity had been greatly decreased, was only entitled to three hundred dollars. It is a mockery. It is inescapable from reading the record, that the damages allowed were so small as to induce the conviction that the verdict of the jury was the result of mistake or oversight on the part of the jury in failing to take into consideration the proper elements of damages in assessing the amount of recovery.

*M. L. Heidelberg*, for appellee.

The appellant in this case obtained a verdict for three hundred dollars and not being satisfied with this sum, appeals to this court, and asks the court to reverse the judgment of the circuit court on the ground that the sum of three hundred dollars is wholly inadequate compensation for the loss of an arm; but appellant goes further and asks the court to reverse the judgment of the lower court to the extent only of setting aside the verdict of the jury as to the amount found, to-wit; the sum of three hundred dollars and letting the verdict stand for appellant, and order a new trial with a new jury to assess damages that will be adequate compensation for the loss of an arm. The evident purpose of this request lies in the fact that under the testimony before the court at the trial of this case the jury could have found against the appellant altogether. In other words the testimony as to the liability of the appellee, or defendant in the court below, was conflicting. Why the jury found for the plaintiff in the court below and assessed damages in the sum of three hundred dollars only cannot be known definitely, but they may have thought the defendant in the court below was not legally liable,

yet out of pure sympathy for the plaintiff allowed him the sum of three hundred dollars; however, the point we wish to contest with the appellant in this case is that the supreme court has no authority to reverse this case in the manner requested by the appellant; that having complained of the judgment given in their favor they must ask that the court reverse *in toto*, and not in part. A judgment in law is an entire thing, and cannot be severed into parts and after such severance, affirm as to part, and then reverse as to part. In the case of *Adams v. Carter*, 92 Miss. 594, and 595, the court said: "Mr. Freeman, in his learned note in the case of *Clarke v. Ostrander* (N. Y.). 13 Amer. Dec. 548, 549, states the general rule to be that the appellant, in this sort of case is barred, and then very pertinently adds: "And it was held in *Binkard v. Babcock*, 2 Rob. (N. Y.), 175, that even in the case of a judgment at law the prevailing party, after having accepted the amount of the verdict, might appeal on the ground of its insufficiency; and that such acceptance amounted to no more than the acceptance of a part of his claim before judgment would have done. But in such a case the appellant tribunal cannot try the case *de novo* (as we cannot) and can only reverse the judgment and remit the parties to the court below. We have the inconsistency of a party undertaking to claim the benefit of the judgment and at the same time set it aside as erroneous." "This criticism," said the court, "is a shot through the center of the target. This court has nothing but appellant revisory jurisdiction. All we could possibly do in this case under our procedure would be, in case of error, to reverse the judgment and remand the cause for a new trial in the court below."

The learned counsel for the appellant insists as earnestly that he only appeals from that part of the judgment disallowing the penalty, and that all he seeks here is, not a reversal of the judgment, but a modification of it; but he is plainly in error when reference is made to the proceedings on appeal. His appeal is prosecuted from the whole judgment as an entirety—a judgment the provi-

sions of which are dependent one upon another. Besides, if we were to pursue the course he indicates, in face of our procedure, and reverse a law judgment which is an entirety, and hold that the thirty per cent. penalty should have been allowed, going even that far, we should still be compelled, under our practice not to enter a judgment here by way of modification for the penalty alone, but to reverse and remand the cause for a new trial. We are dealing with a judgment at law, an entire thing, which has been appealed from as entirety.

Appellant gives authority for his proposition, cases from the state of Louisiana, but the court in that state acts by the authority of statutory provisions which authorize the court to increase or decrease the amount as they, in their judgment, may deem just. Corpus Juris, gives the general rule in these words: "Where the judgment is entire and indivisible, it cannot be reversed in part and affirmed in part, and if there is reversible error therein, it must set aside in *toto*. 4 C. J., page 1180, paragraph 3214, citing courts of many states, including the case of *Adams v. Carter*, 92 Miss. 579, being the case first above referred to, part of the opinion of which is copied into this brief.

W. H. Cook, J., delivered the opinion of the court.

This action is by Willie McLaughlin, a minor, through his next friend, against R. W. Fagan and others for damages for personal injuries alleged to have been sustained by him while assisting in the operation of a dangerous piece of machinery known as an edger, and from a judgment for three hundred dollars against R. W. Fagan and Jim Campbell plaintiff prosecuted this appeal.

Appellant was a minor, about fifteen years of age at the time of the injury sustained, and was employed to work in and about the sawmill of appellee, R. W. Fagan. It appears that his regular work was handling lumber, but on account of a shortage of labor he was sometimes called upon to do other things in and about the mill. At the

time plaintiff was injured he was assisting in the operation of a machine commonly called an edger, and there is evidence that he had been so employed for about two days prior to the injury, and that the foreman, Campbell, had full knowledge of the fact that he was so employed, and that this foreman had directed plaintiff to assist in the operation of this machine. Plaintiff was inexperienced in the operation of this machine, and the foreman, Campbell, denied that he directed him to work around the edger, or that he saw him working there, or had any knowledge of the fact that he was so employed.

A strip or piece of lumber became fastened near the saws of the edger, and while appellant was trying to extract this piece of lumber his coat sleeve was caught by the saws and his right arm was drawn onto the saws, and the arm was so cut and mangled from the elbow to the hand as to make it necessary to amputate it above the elbow.

The case was submitted to the jury under instructions correctly announcing the law, and the jury resolved the question of liability in favor of appellant, but returned a verdict for only three hundred dollars. As compensation for the loss of an arm and the pain and suffering of appellant, this verdict is grossly inadequate, and evinces passion, prejudice, or disregard of the testimony on the part of the jury, and we do not think it should be permitted to stand.

The judgment of the lower court is therefore reversed in so far as it adjudges the amount of damages to be recovered, but in all other respects will remain in full force and effect, and the cause is remanded for the purpose only of adjudging the amount of damages to be recovered by appellant.

*Reversed and remanded.*

CAIN *et al.* v. BARNWELL.

[87 South. 481, No. 21286.]

DESCENT AND DISTRIBUTION. *Husband, not provided for in will, held entitled to undivided one-half interest in homestead lands devised by wife.*

Where a husband of a testatrix did not possess a separate estate at the death of his wife, who devised lands constituting the exempt homestead of both, and where there is no provision for the husband in the will, and there are no children nor descendants of such, the husband is, under section 5087, Code of 1906 (section 3375, Hemingway's Code), entitled to an undivided one-half interest in the lands devised, and this right of the surviving husband is not affected or defeated by the fact that decedent was partially intestate, and that the property not disposed of by the will, and which under the laws of descent passed to the husband as sole heir, constituted, in value, more than one-half of the entire estate of decedent.

APPEAL from chancery court of Jackson county.

HON. W. M. DENNY, JR., Chancellor.

Suit by E. B. Barnwell against W. M. Cain and others. Decree for complainant, and defendants appeal. Affirmed.

*J. C. Broom*, for appellant.

Counsel for appellee in their brief argue that the decision of the court on the former appeal of this case, *Cain et al. v. Barnwell*, 120 Miss. 209, 82 So. 65, will decide the case on this appeal. Apparently, they do not realize the difference in the records on the two appeals. The first appeal was from the decree of the chancery court, overruling the demurrer to the bill. So that the record then consisted only of the bill and the demurrer. Under the rules of pleading the averments of the bill, for that consideration, were taken as true. In the present appeal the record consists of not only the bill and the demurrer, but in addition, the answer and cross-bill by defendants in the

chancery court with exhibits thereto, the answer to the cross-bill and the agreed statement of facts. Counsel relies upon certain statements in the opinion delivered in the case on the former appeal to sustain their argument that the decision then made by the court decides in favor of appellee the question of his right to an undivided one-half interest in the lands devised by Mrs. Barnwell to appellants, her nephews. We find the following in the opinion relative to the appellee's rights to such interest:

"There is an alternative prayer in the bill, that, if the court should hold that the will is good and valid the complainant should be adjudged the owner of an undivided one-half interest in the lands devised; that the appellee did not possess a separate estate at the time of the death of his wife, and under our statutes, there being no provision whatever in the will for the husband, appellee is entitled to be awarded an undivided interest in the lands sued for." *Cain v. Barnwell*, 120 Miss. 225.

There is no provision in the will for the surviving husband and under the averments of the bill, section 5087, Code of 1906, section 3375, Hemingway's Code, applies, the surviving husband as complainant relies upon his statutory rights, and by an alternative prayer in the bill asks that he be declared and adjudged the owner of an undivided one-half of the property described and sued for. Under the averments of the bill he is entitled to this relief, and for that reason the demurrer was properly overruled. *Cain v. Barnwell*, 120 Miss. 232.

We call the court's particular attention to the statement in the opinion that: "Under the averments of the bill, appellee is entitled to an interest in the land. We also direct the court's attention especially to the following statement in the opinion: "The land, apparently, was the only property owned by the testatrix and is the only property mentioned or devised in the will."

The court will notice upon examination of the cases as reported 120 Miss. 209, that the chief question for decision then was the revocation of the will. It will be noted

that the arguments and the opinion of the court were largely addressed to this question, and the other questions raised were but little discussed. After the decision of the main question, the court briefly disposed of the other points raised. It will be seen that the decision of the court would have been that the chancery court erred in overruling the demurrer, had it not been that under the averments of the bill, appellee was apparently entitled to an interest in the land.

Now the court when rendering the decision on the first appeal understood that the land devised in the will was the only property owned by testatrix. The facts in the record of the present appeal show that Mrs. Barnwell owned considerable other property in addition to the land devised to her nephews, which consists of about one hundred and thirty-six acres. It is shown that she owned other land, approximately four hundred acres in amount and money and other personal property shown by inventory in the sum of two thousand one hundred dollars, and other personal property such as cattle, horses, furniture, farming implements, etc.

The situation now presented to the court is that Mrs. Barnwell by her will made a specific devise of certain land, a part of her estate. This part is much less than one-half of her estate. She died intestate as to the remaining property owned by her.

Now, appellee, the husband of testatrix, in his bill attacking the will and claiming that it was revoked and in the concluding part of the bill made an alternate prayer asking that if the court should hold the will valid, he should be adjudged an owner of one-half interest in the property. Thus, he elected to claim the right to share in the estate of his deceased wife, under section 5087, Code of 1906, section 3375, Hemingway's Code, as in the case of unsatisfactory provision in the will as provided in section 5086, Code of 1906, section 3374, Hemingway's Code. The chancery court upon the last hearing of the case on which the present appeal is based, decided that he had the

right to share with the appellants in the land given them by the specific devise, he taking one undivided half.

This decision in favor of appellee is error. We are assured that the above statement of the former appeal in the case shows beyond question that the supreme court did not so decide, for the court did not then have knowledge that a large part of the estate was not disposed of by will. This makes an entirely different question for decision.

The case presented in this appeal is unusual. We find that in the cases involving the question, which have been decided by the court in the past, all of the estate of the deceased spouse was disposed of by the will. In this case there is a specific devise of less than one-half of testatrix's estate. We now refer especially to the argument made by counsel for appellants in the brief in chief with reference to the right of the appellee to receive one-half of the property devised in such cases as that now before the court where the entire estate was not disposed of, and where that disposed of by the will is less than one-half which the surviving spouse would receive and the argument that the testatrix gave the land to her nephews, and that the court will respect and uphold, as far as possible, her wishes and particularly so, where it will not violate the law or public policy and will work no injury or loss upon the appellee, the surviving spouse.

Appellants in their cross-bill sought to have the chancery court decide the question as to the effect of appellee's election to disregard the will of his deceased wife, and take under the statutes. Whether or not in such case he would be entitled to only one-half of all of the property left by his wife, not only that devised but also that which was not disposed of by will. Appellee's counsel in their brief contend that all that is involved in this controversy and the only property owned by Mrs. Barnwell with which appellants are concerned is the property described in the will. They appear to be opposed to the court's deciding the question generally as to appellee's right to property owned by his deceased wife in the present situation arising

from his having elected to claim under the statute. In our view, the court will necessarily have to render a decision in dealing with the entire situation and appellant's right generally. We refer to the argument in the brief in chief relative to this. We do not see how the court can render its decision in this case without dealing with the entire matter of appellee's rights to property left by his wife. Surely, the chancery court erred in giving appellee half interest in the land involved if he is also entitled to all of the remaining estate owned by his wife. We most earnestly ask the court's very careful consideration of the entire situation.

We note the reference, by counsel for appellee, to the case of *Gordon v. James*, 86 Miss. 719, 39 So. 18, and their reliance upon the decision therein to sustain their contention that appellee is entitled to one-half interest in the land devised. We note in that case that all of the property of testator's estate was dealt with by the will and there was a general residuary clause. So, it will be seen that the facts therein are different from the facts in this case. Because all of the estate was disposed of by the will, the court could therein very properly decide that the surviving spouse, upon the renunciation of the will, became a cotenant with each devisee in each and every part of real estate devised. But in this case, the estate generally, was not disposed of and the question herein for decision is very different from that in the case referred to. We cannot see therefore that it is authority for the present case, nor can we see anything in the later case cited, *Williams v. Williams*, 111 Miss. 129, 71 So. 300, to support their contention.

The language of the statutes giving the surviving spouse the right to renounce when satisfactory provision is not made in the will and to elect to claim under the statute when no provision is made, is simple and clear. The person claiming shall in no case be entitled to more than one-half of the estate. We now refer to the argument in the brief in chief for appellants with reference to ap-

pellee's right to elect to take under the statute and in effect renounce the will in this case.

The chancellor sets forth very fully the facts of the case and his holdings in the final decree from which the present appeal is prosecuted, the ownership by the testatrix of the other property besides that devised is shown and likewise that she left a brother and three sisters. In short, all facts necessary to be known are shown in order that the court could decide and by decree settle all questions relating to the right of the appellee in the estate left by his wife. We claim that it was error for the court not to do so.

We respectfully ask that this case be reversed.

*Denny & Heidleberg, for appellee.*

The only matter in controversy to be determined on this appeal is: whether or not appellee is entitled to an undivided one-half interest in the lands described and bequeathed by the will of Mrs. L. C. Barnwell, deceased, to appellants?

Section 5087, Code of 1906, section 3375, Hemingway's Code provides: "If the will of the husband or wife shall not make any provision for the other, the survivor of them shall have the right to share in the estate of the deceased husband or wife, as in case of unsatisfactory provision in the will of the husband or wife, for the other of them; and in such case a renunciation of the will shall not be necessary but the rights of the survivor shall be as if the will had contained a provision that was unsatisfactory, and it had been renounced."

Section 5086, Code of 1906, section 3374, Hemingway's Code, provides: "When a husband makes his last will and testament and does not make satisfactory provisions therein for his wife, she may, at any time within six months after the probate of the will, file in the office where probated a renunciation to the following effect, viz.: "I, A. B., the widow of C. D., hereby renounce the provisions

125 Miss.]

Brief for Appellee.

made for me by the will of my deceased husband and elect to take in lieu thereof my legal share of his estate,' and thereupon she shall be entitled to such part of his estate, real and personal, as she would have been entitled to if he had died intestate, except that, even if the husband left no child nor descendant of such, the widow, upon renouncing, shall be entitled to only one-half of the real and personal estate of her deceased husband. The husband may renounce the will of his deceased wife under the same circumstances, in the same time and manner, and with the same effect upon his right to share in her estate, as herein provided for the widow."

Every allegation of the bill necessary to bring the case within the statute above quoted has been sustained by admission and by proof, therefore, we assert with the utmost confidence that appellee is entitled to the relief sought in the alternative in and by his bill, and that the decree of the chancery court should be affirmed. In *Cain et al v. Barnwell*, 82 So. 65, is the statement of this court that under the averments of this bill section 5086, Code of 1906, section 3375, Hemingway's Code applies. The surviving husband, as complainant, relies upon his statutory rights and by an alternative prayer in the bill asks that he be declared and adjudged the owner of an undivided one-half of the property described and sued for. Under the averments of the bill he is entitled to this relief, and for that reason the demurrer is properly overruled." That decision, referring to the very matter, and the only matter in controversy, here is conclusive.

It settles all possible doubt as to the rights of appellee to the land described in the will of Mrs. Barnwell, and also in the bill of complaint, because the averments of the bill have been fully sustained by the proof. *Gordon v. James*, 86 Miss. 799, 39 So. 18, is further authority for the correctness of our contention that appellee should be adjudged the owner of an undivided one-half of the land described in said will and bill of complaint.

125 Miss—9

And the court in *Gordon v. James*, held that, in such case, the surviving spouse becomes a cotenant with each devisee, and owns a cotenant's half interest, in each and every parcel of real estate specifically devised by the deceased spouse; that the statute is intended to secure to the surviving husband or wife the right to stand upon the law and participate in the estate of the deceased spouse whether such deceased spouse were willing or not. That a husband or wife shall not have the power to deprive the survivor of a just and proper share of an estate which he or she may have aided in building up. Mrs. Barnwell executed her will subject to the laws in force when it would take effect, and therefore, her devisees, appellants, cannot complain. She might have given appellants nothing and they would have been without remedy. Not so with appellee. His right is fixed by law, and is paramount at his option.

In *Williams v. Williams*, 111 Miss. 129, 71 So. 399, holds in substance, to the doctrine announced in *Gordon v. James*, *supra*. In view of what is set forth in the authorities above cited, and also of the statute itself, we are at a loss to understand upon what reasoning appellants reach the conclusion that said statute has no application to the case at bar. Counsel for appellants, in his brief, states that a reversal is sought, or that he proceeds on the theory that inasmuch as the value of the land devised to appellants by Mrs. Barnwell is less than half the value of her whole estate appellee cannot renounce the will; that the right of a surviving husband to renounce the will of his deceased wife is dependent upon whether or not, by the terms of the will, he has been denied one-half of the estate both real and personal. Such theory, or construction of the statute, cannot be based upon reason or authority. It is at variance with the construction put upon the statute by this court in the above cited cases.

Another and equally startling assertion of appellants attracts attention, but fails to carry conviction. It is that the statute designates what is an unsatisfactory provision

in a will or that, under the statute, a surviving husband is denied the privilege of renouncing the will of his deceased wife in all instances where he receives one-half or more of the estate. For answer to this proposition we merely refer to the statute itself and to the above cited authorities. Appellants then say that if they are mistaken in this view of the survivor's right to determine for himself what is an unsatisfactory provision in a will of his deceased wife, and also of any statutory prohibition against the right of a surviving husband to renounce the will when he receives one-half or more of the estate, then and inasmuch as Mrs. Barnwell is survived by several brothers and sisters, and left property not mentioned in the will, such brothers and sisters, that is, the mother, brother and aunts of appellants, should be adjudged part owners of such property.

The expression of this court in *Gordon v. James*, 86 Miss. 799, 39 So. 18, that in such cases, the surviving spouse becomes a cotenant with each devisee, and owns half interest in each and every parcel of real estate specifically devised by the deceased spouse, settles the only matter in controversy here beyond doubt, aside from the other authorities cited above, which are equally clear, strong and conclusive.

Therefore, appellee confidently prays and believes that the decree of the chancery court from which this appeal is taken will be affirmed.

W. H. Cook, J., delivered the opinion of the court.

Appellee, E. B. Barnwell, exhibited his bill of complaint in the chancery court of Jackson county against W. M. Cain, J. B. Cain, and C. E. Cain, appellants, praying that a certain document, purporting to be the last will and testament of Mrs. Louise C. Barnwell, deceased, which had been admitted to probate by the chancery clerk, be declared null and void, and praying for the cancellation of a certain deed executed by testatrix to appellants, or, in the

alternative, if the court shall hold that the will was valid, that complainant should be adjudged the owner of an undivided one-half interest in the lands devised.

It appears from the allegations of the bill that appellee is the surviving husband of the testatrix, Mrs. Louise C. Barnwell, and that appellants are her nephews; that on October 9, 1916, she executed her will devising to appellants certain lands occupied by her as a homestead and particularly described in the bill; that, soon after she made this will, she executed and delivered to appellants a deed of conveyance for the same lands devised in the will. The bill charges that this conveyance, made subsequent to the will, was a revocation thereof, and for that reason the probate of the will in common form should be set aside and the will declared revoked. It is also charged that the lands conveyed constituted the exempt homestead of appellee and his wife, the testatrix; that the deed was void, because appellee, as the husband, did not sign the same; that the appellee did not possess a separate estate at the time of the death of his wife, and under our statutes, there being no provision whatever in the will for the husband, appellee is entitled to be awarded an undivided interest in the land if the will is held to be valid. There was a demurrer to the bill, and from a decree overruling the demurrer an appeal was prosecuted to this court.

The opinion on the former appeal is reported in 120 Miss. 209, 82 So. 65, and the court there held that the deed of conveyance executed by testatrix to appellants was void, and that appellee was entitled to a cancellation thereof; that the will was not revoked by this void conveyance; that the will sufficiently described the lands devised and was valid; that under the averments of the bill the surviving husband "was entitled to be declared and adjudged the owner of an undivided one-half of the property described and sued for," and the cause was affirmed and remanded for further proceedings in accordance with the holdings therein announced.

On the former appeal it did not appear from the record that the testatrix owned any property except that devised and mentioned in the will, and the court there said that the land devised was apparently all the property owned by testatrix; but, when the cause was remanded, appellants filed an answer and cross-bill averring that the testatrix, at the date of her death, owned other real and personal property which was not mentioned or devised in her will, and that, in value, the property not devised was largely in excess of one-half of her entire estate, and denying the right of appellee to be adjudged the owner of a half interest in the lands devised for the reason that, since the testatrix died intestate as to more than one-half of her estate, and appellee, as sole heir of testatrix, inherited this property, his statutory right to one-half of the realty devised was thereby defeated. The cross-bill also sought to recover rent for the devised premises, but since all claims for improvements in the original bill, and for rent in the cross-bill, have now been abandoned, these allegations are not here material.

At the next term of the chancery court the cause was set down for final hearing, by agreement of the parties, upon the bill of complaint, answer, and cross-bill, answer to cross-bill, and an agreed statement of facts; the parts of the agreed statement of facts which are material to an understanding of the question here presented for decision being as follows:

"In view of the fact that, on the recent appeal of this cause to the supreme court, it was held by said supreme court that the instrument of writing purporting to be the last will and testament of Mrs. Louise C. Barnwell, deceased, involved in litigation herein, is the true last will and testament of said decedent, and that the legatees therein and defendants herein are the owners of the land described in said will and in the original bill of complaint in this cause, unless the complainant herein is entitled to one-half of said land under the provisions of the statute pertaining to wills where no provision is made for the sur-

viving husband, namely, section 5087, Code of 1906 (section 3375, Hemingway's Code); therefore, and that the question of whether or not the complainant is entitled to an undivided one-half interest in said land, or whether or not the defendants are entitled to all of said land, and to obviate the necessity of taking testimony, it is hereby agreed that the following statements are the facts in the case, and that same may be submitted as facts and the testimony in the case to be considered by the court on the hearing hereof:

"First. That the said Mrs. L. C. Barnwell made no provision whatever in her said last will for complainant, E. B. Barnwell, and made no disposition of any property owned by her other than the land described in the will and bequeathed to the defendants herein.

"Second. That complainant, E. B. Barnwell, is the surviving husband of the said Mrs. Louise C. Barnwell, deceased, and that said decedent left no child nor descendant of such child, and consequently under the statute of descent and distribution the said E. B. Barnwell is the sole and only heir at law of his said wife.

"Third. That at the time of the death of the said Mrs. L. C. Barnwell she owned other property, real and personal, and as is shown by the inventory in the administration of her estate in this court and the answer and cross-bill of defendants to bill, and which said property was not mentioned nor disposed of in and by said last will and testament.

"Fourth. That at the date of the death of the said Mrs. L. C. Barnwell complainant, E. B. Barnwell, had no separate estate and owned no property.

"Sixth. That several brothers and sisters of the said Mrs. L. C. Barnwell survived her and are still living, and that the defendants herein are nephews of the said decedent and sons of Mrs. Nettie Cain, a sister of the said Mrs. L. C. Barnwell, and which said Mrs. Cain is still and now living in said Jackson county.

"Seventh. That the said E. B. Barnwell, complainant, has paid the state and county taxes on the land described in said will and the pleadings in this cause for the years 1916, 1917, 1918, and 1919, amounting in the aggregate to thirty-nine dollars and sixty-eight cents."

On the trial of the cause a decree was rendered, canceling the deed of conveyance to appellants, and recognizing and establishing the will as the true and valid last will and testament of Mrs. L. C. Barnwell, deceased, and decreeing that, under the provisions of the statute, appellee was the owner in fee simple of an undivided one-half interest in the lands devised, and that appellants, under the provisions of the will, were the owners of an undivided one-half interest in said lands, and that appellee was entitled to be reimbursed for one-half of the taxes paid by him on said premises, and from this decree the present appeal is prosecuted.

The sole question for decision is whether, under the facts as now presented, appellee's statutory right to claim an interest in the devised property is defeated. Counsel for appellants contend that, inasmuch as the value of the land devised to appellants is less than one-half of the whole estate of testatrix, appellee cannot claim the statutory interest in the devised lands, or, to state it in another way, in case the surviving husband has no separate estate, and there is no provision for him in the will of his deceased wife, and there is no surviving child nor descendant of such, his right to claim an interest or share in the devised property is dependent upon whether or not, by the terms of the will, he has been deprived of one-half of the entire estate, both real and personal.

Counsel have failed to refer us to any case, and we have been unable to find any, in which the courts of this state have adjudicated the exact question here presented, and we must therefore look solely to the statutory provisions for guidance in reaching our conclusions. Section 5086. Code of 1906 (section 3374, Hemingway's Code), provides that when a husband makes his last will and testament,

and does not make satisfactory provision for his wife, she may, at any time within six months after the probate of the will, renounce the will, and she shall then be entitled to such part of his estate, real and personal, as she would have been entitled to if he had died intestate, except that, even if the husband left no child nor descendant of such the widow, upon renouncing, shall be entitled to only one-half of the real and personal estate of her deceased husband, and that a husband may renounce the will of his deceased wife under the same circumstances, in the same time and manner, and with the same effect upon his right to share in her estate, as therein provided for the widow.

If there is no provision for the other in the will of the husband or wife, and the survivor have no separate estate, the right of the survivor to share in the estate of a deceased husband or wife is found in section 5087, Code of 1906 (Hemingway's Code, section 3375), which is as follows:

"If the will of the husband or wife shall not make any provision for the other, the survivor of them shall have the right to share in the estate of the deceased husband or wife, as in case of unsatisfactory provision in the will of the husband or wife, for the other of them; and in such case a renunciation of the will shall not be necessary, but the rights of the survivor shall be as if the will had contained a provision that was unsatisfactory, and it had been renounced."

Under section 5086, Code of 1906 (Hemingway's Code, section 3374), the right of the surviving husband or wife to determine for himself what constitutes an unsatisfactory provision in the will of the deceased husband or wife is without restriction or limitation, and when the survivor has elected to renounce the will of the deceased husband or wife, under the provisions of this section, the decedent, so far as the survivor's rights are concerned, becomes intestate, and the rights of the survivor are such as would exist in case of total intestacy, subject only to the limitation that in no case shall the survivor take against

the will a greater share than one-half of the devised property.

Under the provisions of section 5087, Code of 1906 (Hemingway's Code, section 3375), the survivor, who has no separate estate, and for whom no provision is made in the will of the deceased husband or wife, is placed in the exact position of one who has renounced a will containing unsatisfactory provisions for the survivor, and, by virtue of the terms of the statute, such survivor may elect to share in the estate of the deceased husband and wife as in case of unsatisfactory provision in the will, and we do not conceive that, under the provisions of this section, the right of the survivor to elect to share in the estate of the deceased husband or wife is in any respect dependent upon the caprice, desire, or will of the decedent. The language of the statute is plain and positive, and under its terms the survivor is guaranteed the absolute right, at his or her option, to share in the entire estate, and this right is paramount to the rights of devisees under the will. This statute is in effect a limitation upon the right of the husband or wife to dispose of his or her property by will, and every will of a husband or wife is executed subject to the statutory right of the survivor to renounce it in case of unsatisfactory provision, or to claim the statutory share or interest in the devised property in case there is no provision for the survivor, and this statutory right of renunciation or election, as the case may be, is not affected or defeated by the fact that decedent was partially intestate, and that under the laws of descent and distribution other property was cast upon the survivor as the sole heir of decedent.

We conclude, therefore, that, since appellee has elected to stand upon his statutory rights and claim an interest in the devised lands, he is entitled to be adjudged and decreed to be the owner of an undivided one-half interest in the lands described in the bill and the decree, and therefore the decree of the learned chancellor is affirmed.

*Affirmed.*

## BARBER v. STATE.

[87 South. 485, No. 21352.]

CRIMINAL LAW. *Instruction assuming that witness testified to material fact in dispute erroneous.*

An instruction is erroneous that assumes and in effect charges the jury that a witness testified to a material fact which is in dispute when the witness had not so testified.

APPEAL from circuit court of Leflore county.

HON. D. E. BEAMS, Judge.

Lilly Belle Barber was convicted of having intoxicating liquors unlawfully in her possession, and she appeals. Reversed and remanded.

*Gardner, McBee & Gardner*, for appellant.

*H. C. Holden*, assistant attorney-general, for the state.

*W. B. Wheeler* and *F. B. Ebbert*, amici curiae.

No brief of record found.

SMITH, C. J., delivered the opinion of the court.

The appellant was convicted in the court below for having intoxicating liquors unlawfully in her possession and control. The case for the state was made by the evidence of C. L. Bonner, chief of Police of the city of Greenwood, who testified that he entered the appellant's residence and searched it for intoxicating liquors. In one room were several men who appeared to be drinking, and on the mantel was a bottle partly filled with whisky, and in one of the bedrooms he found two quarts of whisky. The appellant testified that the whisky on the mantel was brought to her residence by one of the men present when the house

was searched, and that the bedroom in which the two bottles of whisky were found had been occupied by another person continuously for some months prior to the time when the whisky was found therein, and that she, the appellant, did not know that the whisky was there. The court instructed the jury for the state "that, if you believe from the evidence in this cause, that the defendant knowingly had in her possession or under her control intoxicating liquors as testified to by the witness Bonner, then she is guilty as charged, and it is your sworn duty to so find." This instruction assumes and in effect charged the jury that Bonner had testified that the whisky found by him in the appellant's house was there with her knowledge and was in her possession or under her control, when he had not in fact so testified. His testimony, as hereinbefore stated, was simply that the whisky was found in the appellant's house. Whether she knew the whiskey was there and whether it was in her possession and under her control were facts to be found by the jury from all the evidence in the case. The instruction should not have been given.

*Reversed and remanded.*

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SMITH v. CITIZENS' BANK & TRUST CO.

[87 South. 485, No. 21513.]

**APPEAL AND ERROR.** *Appeal will be dismissed where the real purpose is to obtain reversal but affirmance.*

An appeal will be dismissed where the real purpose is not to obtain a reversal of the decree but to have it affirmed; there being no actual controversy of either law or of fact to be decided.

APPEAL from chancery court of Humphreys county.

HON. E. N. THOMAS, Chancellor.

Suit in equity between W. E. Smith and the Citizens' Bank & Trust Company. Decree for the latter, and the former appeals. Appeal dismissed.

*Green & Green*, for appellant.

No brief for counsel found in the record.

SMITH, C. J., delivered the opinion of the court.

The appellee has filed no brief, and the brief for the appellant is devoted solely to an attempt to convince the court that the decree appealed from is correct. The real purpose of the appeal therefore is not to obtain a reversal of the decree appealed from but to have it affirmed; there being no actual controversy of either law or fact to be decided. When such is the case the appeal should be dismissed. *Darves v. Brooks*, 212 Ill. 566, 72 N. E. 724.

The question which counsel for the appellant seeks to convince us was decided correctly in the court below is an important and difficult one, and should not be decided by this court until it has had the assistance of full argument by opposing counsel.

*Appeal dismissed.*

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FUNCHES v. STATE.

[87 South. 487, No. 21493.]

1. JURY. Court may propound questions to jurors, but parties must be allowed to further examine them for peremptory challenge. In impaneling jury, questions propounded through the court is proper practice, but opportunity must be offered defendant to

further question jury, through the court, for purpose of peremptory challenge.

2. CRIMINAL LAW. *Race prejudice argument to jury held improper.*

It was improper for counsel in his argument to state to the jury that the defendant "has enough African in him to make him as mean as Hades itself;" race, creed, or caste not being in issue

3. CRIMINAL LAW. *Refusal to instruct that accused's failure to testify should not operate to his prejudice held error.*

It is error to refuse instruction telling jury that failure of defendant to testify shall not operate to his prejudice, under section 1918, Code 1906 (Hemingway's Code, section 1578).

APPEAL from circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Neal Funches was convicted of murder, and he appeals.  
Reversed and remanded.

*Hilton & Hilton*, for appellant.

In view of the right of a defendant, to interrogate jurors, after a full panel has been tendered him by the state, for the purpose of exercising his right of peremptory challenge, has been questioned by the attorney-general and refused in this case by the lower court, we desire again to call the court's attention to the law as heretofore announced by this court.

In the case of *Story v. State*, 10 So. 47, the court announced this rule: "There is nothing prejudicial to a defendant in the court's examining jurors on their *voir dire* as to their competency allowing counsel to suggest questions, but not permitting them directly to interrogate on the subject, turning them over, however, to counsel, after being satisfied as to their competency, to question with the view to peremptory challenge.

"In the case of *Hale v. State*, 16 So. 387, the court announced this rule. The action of the court below refusing to permit the examination of the jurors when a full panel was presented to the defendant for his acceptance

or peremptory challenge with the view to intelligently exercising his right to challenge was error, and must reverse the judgment."

The attorney-general answers this argument by citing chapter 115, of the Laws of 1920, which gives to chancellors and circuit judges the right to formulate and promulgate the rules on practice and procedure in their courts. We do not understand that this act gives them the right to take from a defendant his constitutional and legal right in exercising his right of peremptory challenge and this can only be done intelligently by interrogating jurors as so clearly set forth in the Hale case.

They cite rule 10 which provides that the court alone shall examine jurors touching their qualification and should the juror appear to be qualified, the court will ask any additional proper question suggested by counsel. We say that the appellant in this case did not even have this right. See pages 38 and 39 of the record. After a full panel was tendered appellant he made a motion for permission to examine the jury for the purpose of exercising his peremptory challenge. This was refused and the court puts a statement in the record that a full examination could be made, through the court, by the state and defendants, before either side passed upon the jury, but no other examination would be permitted. Now the point is, even granting the position of the attorney-general that the courts had the right to promulgate rule 10, yet as a defendant is never called on to challenge a juror for cause or peremptorily until a full panel is tendered him, surely then defendant has a right to have questions propounded to the jury, after a full panel is tendered at least through the court, even though defendant's are now deprived of interrogating them directly. So under any view of the law on this point, the lower court erred.

Able counsel for the state, not having presented any authority controverting those we have presented showing that it was reversible error for the district attorney to make the argument he did with reference to the defend-

ant being of a mixed race, etc., and as we have fully presented the authorities on this point in our former brief, we shall not put any further time on that point, but say in passing that if a district attorney by argument, can so prejudice a defendant's rights as to justify this court in a reversal, this is one. We do not remember a harsher more inflammatory and prejudicial argument used in the cases cited in our former brief, wherein this court reversed the case. It appears to us that this argument is the limit. We do call the court's attention to the case of *Kelly v. State*, 74 So. 679, as we did not embrace this authority in our former brief.

It is our contention that section 26 of the constitution gives defendant this right by virtue of the provision therein, that, "In all criminal prosecutions the accused shall have the right to be heard by himself or counsel, or both, and to have a trial by an impartial jury." If the laws by which a man is to be tried for his life refuse or deny him the right to interrogate in person or by his selected counsel each juror tendered him by the state, why would not that same law deny him the right to interrogate the witness for and against him, and compell him to have the court, on his suggestion, to ask all questions of the witnesses? We cannot believe that it is the policy of the law, especially in criminal cases and still more especially when a man is on trial for his life, to deny him the right to examine each juror when a full panel has been tendered him by the state.

The fifth assignment of error is based upon the action of the court in refusing instructions Nos. 2, 4, 5, 11, 14 and 15 asked by the defendant. We submit that each of those instructions properly announced the law of the case, and should have been given, and especially is this true with reference to instruction No. 15 which reads as follows: "The court instructs the jury for the defendant that they as jurors have no right under the law to draw any unfavorable inference against the defendant because he did not testify in this case." The right of the defendant to

testify in his own behalf is given him by law, and it is the law that no prejudicial inference is to be indulged against him if he fails to testify, and we think this instruction was applicable in this case, in view of the comment of the private counsel as shown by the record in his closing argument to the jury, over the protest of the defendant. and sanctioned by the trial court and which is assigned as error No. 10.

The twelfth assignment of error is that the court erred in permitting the district attorney in his opening argument to the jury to make the following argument over the protest and objections of defendant: "Gentlemen of the jury, the defendant in this case has got enough white man's blood in him to make him a man of judgment and sense, and he is a smart fellow indeed, and on the other hand, he has enough African blood in him to make him as mean as Hades itself."

We submit that under all the authorities which are too numerous for citation, this class abuse on the part of the prosecuting attorney is reversible error. There is no evidence in the record to show that the defendant is a mulatto, or has one drop of white man's blood in his veins, neither is there any evidence in the record showing that he is a mean negro. His character was not put in issue by the defense and it for this reason could not be assailed by the prosecution. This argument was not only unwarranted by the evidence as shown by the record, but was an appeal to race prejudice, and highly prejudicial to the rights of the defendant. *Kelly v. State*, 74 So. 679, and authorities there cited.

In conclusion we most seriously insist that this case certainly will be reversed and it is our honest belief the defendant should be discharged by this court. We cannot understand that a man should be deprived of his life or liberty under such proceedings as are revealed by the record of this case.

*Fred W. Lotterhos*, for appellee.

There is no rule of law which gives one on trial the positive right to propound questions to the veniremen directly and not through the medium of the presiding judge. The appellant is promised that he shall have a fair and impartial jury to try his case. The learned trial judge herein was very careful to tender the appellant full privilege to ask questions through the court.

For many years it has been the custom in some circuit courts in Mississippi to require the *voire dire* examination to be made in this way in capital cases, and under the rules made by the judges and chancellors, under the recent act of the legislature of 1920 is to be found the following: "Rule 10. In all cases the court alone shall examine jurors touching their qualification, and should the juror then appear to be qualified, the court will ask any additional proper questions suggested by counsel." Which is but another recognition of the propriety of such a rule of court, so that now instead of this being a rule in some of the circuit courts it has become the universal rule in Mississippi.

This question was presented *In re Farmer v. State*, recently affirmed, and not yet reported, by this court. Hence it is submitted that it has been decided by this court that such a rule shall not constitute reversible error. The provisions of law in relation to juries are directory and a jury, although impaneled in an informal or irregular manner, shall be deemed a legal jury after it shall have been impaneled and sworn. Hemingway's Code, section 2211; *McVey v. State*, 78 So. 150.

In this case appellant did not exhaust all of his peremptory challenges, and there is nothing to indicate that he did not have a fair and impartial jury or that the rule of the court governing the examination of veniremen was prejudicially erroneous, illuminating in this matter. See *Powers v. Presgrove*, 38 Miss. 327; *Guice v. State*, 60

Miss. 714; *Hale v. State*, 16 So. 387; *Story v. State*, 68 Miss. 609; 16 R. C. L., pp. 246 and 247.

The argument of the district attorney in the following language: "Gentlemen of the jury, the defendant in this case has got enough white man's blood in him to make him a man of judgment and sense and he is a smart fellow indeed. And, on the other had, he has enough African blood in him to make him as mean as Hades itself," didn't necessarily inject the race issue into the case for the reason that deceased and appellant were of the same race; and if the appellant is a Mulatto, that fact was obvious to the jury; and if he was not, the comment would not have been taken by the jury as being anything but a rhetorical expression of counsel.

This court, in *Jennings v. The State*, 118 Miss. 619, said: "The statement of the district attorney to the jury was questionable ethics, and technically inaccurate. In this case, however, we are of the opinion that no harm was done; the district attorney is not expected to approach with the cold neutrality of the judge. He is an advocate and somewhat of a partisan, and no doubt, the jury is able to make due allowance for the arguments of the lawyer for the state.

Injection of the race of the defendant into the case can work harm when there is a race issue, or a clash between races, but it would appear that a comment on the race of a party could not raise an issue where the accused and the party assaulted are of the same race. However, the question of propriety or impropriety of the argument of the counsel and its sufficiency to affect the finality of a judgment is, after all, a question for this court to determine in each case. There is no rule of law by which the counsel for the state can aid the court by saying when argument is improper, and harmfully so. It does appear throughout the decisions that an improper comment will not of itself impeach a verdict unless it was not only improper but was prejudicial and the verdict might have been otherwise without it.

Instructions refused to the appellant. The court gave fourteen very ably drawn instructions for the appellant, which covered the case fully in its various aspects. Ten instructions asked by the appellant were refused, but a careful comparison of those given will reveal that all the instructions taken together, cover the law of the case. The assignment of error upon instructions refused refer to the instructions by number of but few of the instructions; therefore, it is not possible to say from the record, just which instructions are complained of, with the exception of those which are quoted in the assignments and briefs of counsel. Several of the refused instructions embrace various principles of law grouped in one instruction, and in most instances the refused instruction was covered, in part if not in whole, by instructions which were already given, and to have given it would have been but reiteration of principles already elaborately charged.

*R. C. Russel*, for appellee.

There can be no merit whatever in appellant's contention that the court erred in not permitting his counsel to examine each and every juror touching his qualification as a juror; because neither the constitution or laws of our state authorize it. The trial judge often grants the attorneys this privilege, but it's a mere courtesy of the court and not a constitutional or legal right that the attorneys have. Chapter 72, Code of 1906, provides how all jurors are to be empaneled in capital cases.

All the law I have been able to find makes it the duty of the trial judge to qualify the jury. And rightfully so because jurors are not either litigants or witnesses, and should not therefore be subjected to a grilling examination by astute lawyers. If the attorneys for the defendant have the right to carry each juror through a searching examination the district attorney would have the same right and these two examinations, coupled with the judge's neces-

sary examination, when would you ever get a jury empaneled under any such procedure as this?

Section 2718, Code 1906, says that listing, drawing, summoning and impaneling of juries are directory merely, and this being true, then before appellant would be entitled to a reversal of this case he must show that he did not have a fair and impartial jury, or that the court refused to propound competent questions to the jury suggested by appellant's counsel.

Counsel for appellant does not intimate that they did not have a fair and impartial jury, or that there was fraud practiced in the selection and impaneling of the jury. The only thing counsel for appellant complains about is that the court refused to let them give the jurors on their *voir dire* examination a grilling examination and there is nothing in this record to show that this was prejudicial to appellant, and if it was not the case should be affirmed so far as this assignment of error is concerned. See *Buchanan v. State*, 84 Miss. 332, 36 So. 388, 65 So. 584.

The court did not err in refusing appellant instructions 2, 4, 5, 11, 14 and 15, because this court will certainly take judicial notice of the fact that it doesn't take fifteen or twenty instructions to properly submit appellant's theory of this case to the jury; and, besides, the record will show that the court did grant appellant numerous other instructions which, when taken together, certainly announced the law correctly and submitted every right appellant had to the jury. In fact it is very infrequent that a jury in this sort of a case is ever misled by instructions. This court held in the case of *Higgins v. State*, 83 So. 245 (Miss.): "We think it was not reversible error to refuse instruction No. 7 as set out because the law upon the subject was fully and fairly given, taking the instructions as a whole."

The district attorney's language that appellant is a smart fellow indeed, and on the other hand, he has enough African blood in him to make him as mean as Hades itself, etc., is assigned as error and the case of *Kelly v. State*, 74 So. 679, is cited as authority on this point; but a care-

ful examination of the facts in the Kelly case and those of the instant case will show that the two cases are not similar. In the Kelly case the district attorney vigorously urged the jury to convict, characterizing the defendant as a bad negro, etc. And in the instant case the district attorney used no such language, but merely said that appellant had enough African blood to make him as mean as Hades, etc., not that he was as mean as Hades or that he was a bad negro as was said in the Kelly case, nor did the district attorney vigorously demand appellant's conviction in the present case. And further, if the district attorney had said that appellant is a bad negro, he would have been in the record, because if this testimony is to be believed, and it was by the jury, appellant is shown beyond a doubt to be a desparate character, and certainly the district attorney had a perfect right to comment on that fact.

Appellant, taking the record as a whole, has had a fair trial, and the right result has been reached, except that the death penalty should have been inflicted and the case should therefore be affirmed.

HOLDEN, J., delivered the opinion of the court.

The appellant, Neal Funches, was convicted of murder and sentenced to life imprisonment. The conviction rests wholly upon circumstantial evidence, which, we think, however, was sufficient to warrant the verdict of the jury. The appellant assigns numerous errors for reversal, but we find merit only in two or three of the assignments, which we shall now discuss.

It is contended the court erred in refusing to allow counsel for appellant to further examine the jurors before exercising his peremptory challenges.

It appears that in impaneling the jury the court questioned the jurors on their *voir dire* and then requested that the state and defense ask any further questions desired through the court. After the jury had been fully questioned and qualified by the court, and questioned by coun-

sel for the state and the defendant through the court, counsel for defendant requested that he be permitted to ask further questions directly, or through the court, with the view of exercising his peremptory challenges. The court denied the request on the ground that full opportunity had been given to counsel for the state and the defendant to ask the jurors any and all questions they desired when the jurors were being qualified, and that counsel had then exercised this right by questioning each juror through the court. It does not appear from the record what the further questions were that counsel for defendant desired to ask the jurors.

The rule followed by the lower court of requiring all questions to be asked jurors through the court is good practice, and is upheld by this court; but opportunity must be afforded the defendant to propound to the jury, through the court, such further questions, within the bounds of reason, as he may desire, with the view of exercising his right to challenge peremptorily. The privilege of such questioning by the defendant for peremptory purposes should not be denied.

The right to challenge peremptorily is sacred and valuable; and the exercise of it does not rest upon any legal qualification of the juror, but it may be exercised by the defendant for any peculiar reason, or no reason, and without legal cause. We do not know from the record here what question counsel desired to ask the jury, and therefore cannot say that the refusal of the court to permit the question was error and damaging to the rights of the defendant. The question may have already been asked and should not be repeated.

It is next contended by appellant that the court erred in allowing the prosecuting attorney to state to the jury in his argument that "The defendant in this case has got enough white man's blood in him to make him a man of judgment and sense, and he is a smart fellow indeed, and on the other hand he has enough African in him to make

him as mean as Hades itself." This statement was objected to, but there was no response by the court.

This kind of argument by the district attorney was improper, and has been condemned by this court many times in the past. Any argument of counsel to a jury which is based upon race prejudice should not be indulged in a court of justice. Such argument is foreign to the issue involved in the case and is calculated to do great harm to the interest of the accused.

Let us say once more, the humblest human being, be he white or black, red or yellow, is entitled to a fair and impartial trial on the sole issue of guilt or innocence under the law and evidence of the case. The courts of justice of our country will never retrograde to the unfair and barbarous practice of trying the accused upon his color, creed, or caste.

The injury done the accused in this case by the improper argument of the prosecuting attorney might not appeal to us as being sufficient for a reversal if there were no other errors in the record, and we therefore pass from this question without deciding whether or not it was reversible error.

But there must be a reversal upon the ground that the court erred in refusing to grant an instruction to the defendant, which is as follows:

"The court instructs the jury for the defendant that they as jurors have no right under the law to draw any unfavorable inference against the defendant because he did not testify in this case."

As we have said before, the conviction in this case rests upon circumstantial evidence, and the defendant did not testify in his own behalf. Under section 1918, Code of 1906 (section 1578, Hemingway's Code), it is provided that—"The accused shall be a competent witness for himself in any prosecution for crime against him; but the failure of the accused, in any case, to testify shall not operate to his prejudice or be commented on by counsel."

We think the court was in error in refusing to grant the instruction asked for by the defendant. The statute clearly announces his rights in the premises, that is, his failure to testify shall not operate to his prejudice; and he was entitled to have the court instruct the jury as to this legal right.

We do not say that the refusal of the court to grant the instruction would in all cases result in a reversal, because it might appear manifestly in some cases that the refusal of the instruction resulted in no injury to the accused in his trial. But we think the error in refusing the instruction in this case is reversible for the reason that, coupled with the refusal of the instruction to the defendant, counsel for the state in his argument to the jury used the following language, "We have never got Neal Funches to talk about this thing; he has always run away from it;" to which remarks counsel for defendant objected at the time. It is true it appears in the record that this language by the prosecuting attorney had reference to certain evidence in the case which went to show that the accused refused to talk about the killing or to say anything with reference to it in his own neighborhood and elsewhere, and comment of counsel upon this part of the evidence was ordinarily legitimate, but peculiarly in the case before us it is quite probable that these remarks of the prosecuting attorney indirectly led the minds of the jury to the fact that the accused had failed to testify in his own behalf. This comment, though indirectly, accentuated the error of the court in refusing the instruction to the defendant telling the jury that his failure to testify should not operate to his prejudice, and, taking the comment of the prosecuting attorney coupled with the error of the court in refusing the instruction, makes the refusal of the instruction reversible error.

*Reversed and remanded.*

## FRATERNAL AID UNION v. WHITEHEAD.

[87 South. 453, No. 21472.]

1. APPEAL AND ERROR. *Insurance. Where reasonable men may draw different conclusions from evidence, verdict not set aside; evidence showed insured railway mail clerk did not jump from car, but fell out.*

The jury is the judge of the credibility of the witnesses and the weight of the evidence; and where the facts and circumstances are such that reasonable men may draw different conclusions therefrom, the verdict of a jury will not be set aside as being insufficient to support a verdict. The facts in this case examined, and held sufficient to support the verdict. (*Post*, p. —.)

2. INSURANCE. *Constitution of benefit society that no officer or agent might alter, modify, or waive provisions held void.*

A provision in the constitution and by-laws of a benefit society that "no officer or member of the supreme lodge, except the supreme president by dispensation, nor any local or subordinate lodge or any officers or member thereof, or any organizer, deputy, or agent, shall have authority to change, alter, modify, or waive any of the provisions of this constitution," is void because a corporation, society, or individual cannot repeal the law of estoppel and waiver, and because said provision does not leave any officer or agent of the society who may act for it so as to bind it as to these subjects. *London Guarantee & Accident Co. v. M. C. Railroad Co.*, 97 Miss. 165, 52 So. 787.

3. INSURANCE. *Representations in application not warranties when made on explanation of manager of society.*

Where a state manager of a benefit society whose powers are not limited by the by-laws of the society makes out an application for an applicant for a benefit certificate, and writes the answers to questions propounded to the applicant and interprets the meaning of such questions and writes answers after having the full facts explained to him by the applicant, the answers will not be held warranties so as to avoid the certificate issued thereon, even though not literally true. If they are not false, considered in the light of the facts made known to the agent, or if not false in the light of his explanations of the meaning and purpose of the questions asked, they will not avoid the policy or certificate.

APPEAL from circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Action by Mrs. Julia A. Whitehead against the Fraternal Aid Union. Judgment for plaintiff, and defendant appeals. Affirmed.

*Wells, Stevens & Jones* and *A. J. Calhoun*, for appellant.

The testimony for both plaintiff and defendant neither raised nor left an issue for the jury and the court should have peremptorily found for the defendant or have so directed the jury. See: *Continental Casualty Co. v. Hardenberg*, 83 So. 278.

The next error of the court upon which we rely for reversal of this case and judgment here, was that of overruling the demurrers of the defendant to plaintiff's amended replications to the third and fourth pleas of the defendant, and the granting of the instructions numbers 2 and 5 for the plaintiff.

This action of the court was in palpable violation of the provisions of section 20 of the uniform Fraternal Beneficiary Law adopted by the state of Mississippi and which appears as section 5192, of Hemingway's Code. heretofore copied herein, this Fraternal Beneficiary Code has been enacted in thirty-two states of the Union and was adopted by the legislature of Mississippi in 1916. A determined effort was made to have this section of the code repealed by the legislature of state of Mississippi at its session in 1920, but after a hearing thereon the bill for that purpose was defeated.

The theory upon which the learned circuit judge below acted and ruled as he did, was that Mr. Reagan, who was the local organizer of the local lodge of the defendant, could and did waive for the defendant order in certain material particulars provisions of the contract of insurance and in advising the applicant to falsely answer the question propounded to him, by his action the com-

pany was estopped to set up the false answer made by the applicant as set forth in the application, upon the faith of which the defendant acted.

Section 106 of the constitution of the defendant has been copied hereinbefore in full. In addition, however, to this provision of the constitution, which probably was not before the applicant at the time of his application and in order that no wrong might be done by anyone thereby, there is printed in the application itself, immediately before the signature of the applicant the following provision which was expressly agreed to by the applicant when he made his application for insurance, to-wit:

"I hereby agree and declare that all statements and answers made by me herein to be warranties, and in all respects full, true and complete; that such statements and answers were written by my direction and read over by me before the signing of this application, and that said statements and answers have been in no way or manner affected or induced by any agent, officer or representative of the Fraternal Aid Union and I hereby agree for myself and my beneficiary or beneficiaries, if any one or more of such answers or statements are false, untrue or fraudulent, the benefit certificate which may be issued to me shall be null and void and of no effect.

It will therefore be seen that not only was this section 106, enacted in compliance with said section 20 of the Fraternal Beneficiary Act, and should be enforced by this court, but also in order that no harm might be done, the applicant was expressly warned to make his answers full, true and complete, and not to be influenced by any advice of officious representatives who seem to think they know more about what the medical directory should pass upon as being material to the risk than such medical directors who have given years of study to the proposition.

But whether or not this court should agree with us upon the wisdom of this law enacted by the legislature, it appears to us, with great deference that this is utterly immaterial. That was a matter for the legislature and

the legislature has not only acted and passed the law, but has declined to repeal this very provision.

This section is one of the most important of what is considered the model fraternal beneficiary law approved by the insurance commissioner of this state, by the National Insurance Commissioner Association, and as above stated, is now rapidly being adopted by all of the states of the Union, governing fraternal beneficiary companies.

It should be remembered that instead of being a commercial corporation, the defendant is a fraternal benefit society. In recent years the courts have recognized the fact that insurance on the fraternal plan, with mutuality and without profit distinguishes the work of such an association from a commercial enterprise, and the association should not be measured by the standard, or determined by the legal principles which are applicable between an ordinary insurance company and the holder of one of its policies.

Every member, in fact stands in the peculiar situation of being party of both sides, insurer and insured, and the members of the association are, so to speak partners. *Newman v. Supreme Lodge K. of P.*, 70 So. (Miss.) 241; *Thomas v. Knights of the Maccabees*, 149 Pac. 7; *Royal Arcanum v. Green*, 237 U. S. 531.

Unless this court, therefore, we respectfully submit, is prepared to declare null and void this section of the law of Mississippi and hold it unconstitutional for some reason unknown to us, or do as the lower court did, hold that the legislature could not have meant what the law plainly provides, then, we respectfully submit that the action of the lower court is palpably erroneous and contrary to the provisions thereof and will have to be reversed and judgment entered here for this defendant.

Under almost precisely similar facts and under exactly the same provision of law, our sister state of Alabama recently sustained the validity of this law and denied recovery in the case of *Woodmen of the World v. McHenry*, 73 So. 97. Likewise our sister state, Louisiana, on the

west has upheld said section 20 in a very recent case of *Bargainer v. Knights of Maccabees*, etc., decided May 31, 1920, 85 So. 57.

Likewise, the state of Tennessee on the north has upheld that exact provision in the case of *Simmons v. Sovereign Camp, Woodmen of the World*, 188 S. W. 941. See, also, the following authorities directly in point: *Vant v. Grand Lodge Knights of Pythias*, 86 S. E. 677 (S. C.); *Currence v. Sovereign Camp, Woodmen of the World*, 78 S. E. 442 (S. C.); *Woodmen of the World v. Wernett* (Texas), 216 S. W. 669; *Greyson v. Grand Temple, etc.*, (Texas), 171 S. W. 489; *Hubbard v. Modern Brotherhood*, 93 S. W. 911; *Hartman v. National Council, etc.*, 175 S. W. 212 (Mo. App.); *Thompson v. Modern Brotherhood*, 189 Mo. App. 15, 176 S. W. 506; *Brittenhan v. Sovereign Camp W. O. W.*, 67 S. W. 587, (Mo. App.); *Baycock v. Sovereign Camp W. O. W.*, 155 N. W. 923, (Wis.); *Sternheimer v. Order Commercial Travelers*, 93 S. E. 8 (S. C.); *Klein v. Supreme Council Loyal Association*, 163 N. Y. Sup. 5; *Supreme Court Riess v. Supreme Conclave, etc.*, 164 N. Y. Sup. 878; *Woodmen of the World v. Hall*, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517; *Sumelin v. American Fraternal Stars*, 167 N. W. 844 (Mich.); *Davis v. National Council, etc.*, 196 S. W. 97; *Sov. Camp W. O. W. v. Anderson*, 200 S. W. 698 (Ark.).

Even before the passage of the so-called New York conference bill, the uniform fraternal bill above referred to by us, containing said section 20 many of the states upheld the validity of such by-laws providing against waiver and estoppel by local lodges and officers thereof. *Dillon v. National, etc.*, 244 Ill. 202; *Supreme Council v. Taylor*, 121 Fed. 66; *American v. Hardiman*, 124 Ga. 379; *United Order v. Hooser*, 160 Ala. 334; *Borgrafe v. Knights of Honor*, 22 Mo. App. 127; *Bixler v. Modern Woodmen*, 112 Va. 678.

We are utterly at a loss to understand upon what theory the learned circuit judge below ruled as he did in the face of said section 20. We respectfully submit that the

case should be reversed and judgment entered here for the defendant. Again, the demurrer to the amended replications to the third and fourth pleas should have been sustained on the second ground thereof, which is as follows: "The deceased in his application, which becomes a part of the contract and filed as exhibit 1, to the second plea of the defendant contracted as follows with defendant herein to-wit:

"I hereby agree and declare that all statements and answers made by me herein to be warranties, and in all respects full, true and complete; that such statements and answers were written by my direction and read over by me before the signing of this application, and that said statements and answers have been in no way or manner affected or induced by any agent, officer or representative of the Fraternal Aid Union, and I hereby agree for myself, and my beneficiary or beneficiaries if any one or more of such answers or statements are false, untrue or fraudulent, the benefit certificate which may be issued to me shall be null and void and of no effect and plaintiff is estopped to plead either waiver or estoppel.

We submit that appellee is in no position to plead waiver and estoppel in the face of the provision of the application quoted in the above ground of demurrer, after the appellant had acted on the good faith and truthfulness of the warranty and statements contained in said agreement, and after the decedent had obtained insurance on the faith and truthfulness thereof; in short, after the appellant had changed its position from a probable insurer to an insurer in fact on the strength of that warranty and agreement appellee was and is estopped to plead estoppel and waiver. He is estopped by his contract to claim that his answers were not correctly reduced to writing. See 21 C. J., Estoppel, secs. 114-4; *Benes v. Supreme Lodge, etc.*, 231 Ill. 134, 14 L. R. A. (N. S.) 540; *Metropolitan Life Ins. Co. v. Dimick*, 69 N. J. L. 384, 62 L. R. A. 774; 2 Joyce on Insurance, p. 1231, sec. 502, and cases there

cited; *Fitzmanrain v. Mutual, etc.*, 84 Texas, 61, 19 S. W. 301.

In view of the above position taken by us under one and two, all instructions granted for the plaintiff were erroneous and we will not further argue them, except as the argument above made applies to each.

*Teat & Potter*, for appellee.

The evidence of the plaintiff on the suicide issue tended to prove that the deceased bore a good reputation in his community for honesty and fair dealing; that his family relations were happy, pleasant and congenial; that he promptly took care of his obligations; was a good father and husband and when in Jackson spent most of his time at home. Of course, the only theory upon which these questions were asked by us was to prove that he was not a man who would rifle mail or commit suicide and it is clearly competent as tending to prove these facts.

We must insist, with all due deference to opposing counsel that the evidence together with the fact that he was suffering with vertigo, and with the presumption against suicide in our favor raises a question of fact for the jury to pass on.

Point Two. The second error urged by the defendant why the case should be reversed and remanded is that under section 20 of Chapter 206, of the Acts of 1916, the local organizer could not waive any of the provisions of the laws of the company. Our answer on this point is threefold: (a) That section 20 and any by-law adopted thereunder could only apply to a member and not to an applicant; (b) That the constitution adopted by defendant did not state that any local agent could not waive any provision or question in the application but could not waive any provision of the constitution and (c) even if defendant did not waive the question it is now estopped from setting it up as a defense.

The pleas relied on by the defendant are to the effect that Whitehead breached his warranty in stating that he had not been treated by a physician during the past five years.

Counsel states that Whitehead deliberately and willfully misstated the facts to the agent of the defendant, Mr. Regan, on this point and therefore a peremptory instruction should have been given to defendant. He states in his brief that the evidence shows that Whitehead falsely answered the question propounded by Regan on this point. Let us consider the evidence on this feature of the case.

Taking up the last first and turning to page 139, of the record, we here find that Mr. Regan testified that he always asked applicant not whether they had ever been treated by a doctor in regard to personal ailments within the past five years, but had the applicant been seriously sick during the last five years, and unless there was a serious illness he would always write "no."

"Almost everybody has been sick during five years, bad colds, or a little fever or something; but those things are not supposed to be answered 'yes' there unless you have been confined to your bed and had a physician in regard to personal ailment. If you say 'yes' they would have to give the date, every time they had a cold and unless they are of a serious nature they are always answered 'no' by an insurance man."

In regard to the two pleas Mr. Regan stated that Whitehead told him that he had had a policy of one thousand dollars in the Lamar Life but had let it lapse. He stated that the reason that he (Regan) wrote that Whitehead had the policy in the Lamar Life was because he did not know whether or not Whitehead had any extended insurance thereunder and then, too, in order to let his company know the applicant had been passed as an acceptable risk by another company.

He states in regard to the fractured leg that he knew that Whitehead hurt his leg some time before but that

he considered it immaterial. He was intimately associated with Whitehead for a number of years and knew that he suffered no evil effect from the fracture and knew that it had completely healed.

Appellant contends that section 20 of chapter 206, of the Acts of 1916, which reads as follows: "The constitution and laws of the society may provide that no subordinate officer shall have the power or authority to waive any of the provisions of the laws and constitution of the society and that the same shall be binding on each and every member thereof on all beneficiary members," together with the by-laws adopted thereunder, which reads as follows:

"No officer or member of the supreme lodge, except the supreme president by dispensation, nor any local or subordinate lodge or any officer or member thereof or any organizer shall have the power to modify or waive any of the provisions of the constitution" prevents the agent of defendant from waiving a complete answer in the application.

We contend first that this section twenty, which says "members" and not applicants shall be bound by the laws of the order and that the same cannot be waived, ought not to be binding upon one before he becomes a member. It is very well to declare that a member shall be bound by the laws of his order for he is presumed to know them, but it would be, it seems to us, the Alabama case to the contrary, notwithstanding the worst sort of fraud to hold that one, who has never even seen the laws of the defendant; who has never even had a chance to see them and who is dealing with the duly authorized agent of the defendant, cannot rely upon what that agent tells him concerning the answers he shall make to questions in the application.

We cannot believe that this court will thus let down the bars for fraud and perfidy by so holding. This strained construction, for it is a strained construction because it would have been extremely easy for the legislature to

have said member and applicant should they have meant the applicant, would be imputing to the legislature the desire and purpose of being a party to every such fraud that would undoubtedly be perpetrated upon innocent victims, should this court place this construction upon the act.

But let us suppose for the sake of argument, that the proper construction was placed on the statute in the *McHenry* case. In that case the Woodmen of the World adopted this by-law under the act: "No officer, agent, etc., shall have the right, power, or authority to waive any of the conditions upon which the beneficiary certificates are issued. . . ."

There is some semblance of reason to hold as the court did in the *McHenry* case, *supra*, that the applicant was bound by the agent's acts. But did this defendant adopt the same or a similar provision under section 20? It did not. Its law adopted thereunder is as follows: "No officer . . . or any organizer . . . shall have the authority to waive any provision of this constitution."

Nowhere does the constitution of the defendant state that the organizer shall not waive provisions in the application as did the constitution of the Woodmen of the World in the *McHenry* case. And it is a fundamental rule, which applies to benefit societies as well as old line companies, that the policy and all parts of the contract are construed most strongly against the insurer. Surely it is not the same thing to say that no agent has the power to waive any part of the constitution and to say no agent has the power to waive any part of the constitution in the application. Suppose that an extremely careful man who was familiar with section 20, would apply for a policy with defendant. Let us further suppose that he would ask to see the portion of the constitution adopted under section 20, and he would there read: "No organizer shall have the power to waive any provision of this constitution."

He would then read the entire constitution carefully and when the organizer took his application he would answer, as Whitehead did, the questions asked, and the organized would write the answers down, as Regan did in the present case. Would this applicant have read anything to put him on notice that Regan did not have the power to answer as he did? We think not and should this defendant attempt to lay a trap for the unwary who put their faith in the agents of the defendants, they should do so in plain, unambiguous terms. In other words, to take advantage of the statute, should this court hold that it is an instrument of fraud and not of protection; that it is a sword and not a shield; it should come clearly within the statute, which we submit, it has not done in the present case.

Our last point on this question is that even if our first two answers on this question are not well taken, then the defendant is estopped from raising a breach of warranty as the action of their agent was responsible for the acts of Whitehead. While waiver and estoppel are similar terms there is a fundamental difference. Waiver is the relinquishment of a known right, while estoppel is the act of a person whereby he places another in such a position as would make it inequitable for the first to take advantage of the position taken by the latter at the instance of the former. As stated by Bacon in his work on Benefit Societies, 2nd Vol., p. 1431:

"Waiver is the relinquishment or refusal to accept a known right, while estoppel is the preclusion of a person to assert a fact, by previous conduct inconsistent therewith on his part or on the part of those under whom he claims."

As stated by a Vermont case, *Webster v. Insurance Company*, 69 Atl. 319, while the terms "waiver" and "estoppel" as applied to the laws of insurance are usually construed the same, yet there are essential differences between them. Waiver is the intentional relinquishment of a known right and does not necessarily imply that one has

been misled to his prejudice while estoppel is the acts or conduct of both parties and may arise where there is not an intent to mislead and also involves the misleading of one to his prejudice.

The court will bear in mind that the statute involved is in derogation of the common law and should therefore be strictly construed. Here we find Regan, without any fraudulent intent it is true, but nevertheless misleading Whitehead in the matter of the one thousand dollar policy with the Lamar Life in the matter of the broken leg and in the matter of vertigo to his prejudice. The statute nowhere states that the defendant cannot be estopped by the action of its agents, and we contend that we have a clear case of estoppel.

ETHERIDGE, J., delivered the opinion of the court.

The appellee filed a suit against the appellant on a certificate of fraternal insurance issued upon the life of Hubert T. Whitehead, who came to his death by jumping or falling from a railway mail car on the Gulf & Ship Island Railroad Company.

The application for a certificate by Whitehead contained, among other things, the following stipulations:

"I hereby agree, in consideration of the issuance to me of a benefit certificate, that the contract between the Fraternal Aid Union and myself shall be this application, and the accompanying medical examination, and the benefit certificate to me and the constitution and laws of the said Fraternal Aid Union, now in force or hereafter adopted, including all amendments hereafter made."

"For myself and my beneficiary or beneficiaries, I agree further that all interests, rights and benefits which may or shall have accrued by reason of my membership in said order shall, in case of my expulsion from, or the voluntary severance of my connection with, said order, or in the event of my failure to comply with or violation by me of the constitution or laws of said the Fraternal Aid Union

now in force or hereafter adopted, including all amendments hereafter made, be absolutely forfeited and determined."

"I hereby agree for myself and my beneficiary or beneficiaries that any physician or surgeon who may have attended me for any illness or injury is hereby directed and authorized to impart to, and any duly authorized representative of said society shall be entitled to receive from, any such physician and surgeon a full statement of any matters which may have come to his knowledge in his professional capacity while so attending me, and I further agree that, notwithstanding the law, or laws, of any state or territory rendering incompetent or privileged the testimony of any physician or surgeon as to matters coming to his knowledge in his professional capacity, in case of suit brought to recover on any benefit certificate issued to me by said the Fraternal Aid Union, the testimony of such physician or surgeon with regard to such matters shall be admissible in evidence."

"I hereby agree and declare that all statements and answers made by me herein to be warranties and in all respects full, true, and complete, that such statements and answers were written by my direction and read over by me before the signing of this application, and that said statements and answers have been in no way or manner affected or induced by any agent, officer, or representative of the Fraternal Aid Union, and I hereby agree for myself and for my beneficiary or beneficiaries, if any one or more of such answers or statements are false, untrue, or fraudulent, the benefit certificate which may be issued to me shall be null and void and of no effect."

"Have you in the past five years been treated by or consulted any physician in regard to personal ailment? A. None."

"What illness, disease, or injuries have you had since childhood? A. None."

The policy issued on this certificate contained the following, among other things:

"This certificate is based upon the application of the member to whom the same is issued and the medical examination accompanying the same, and said application with said medical examination, the articles of incorporation, the constitution and laws of the association now and hereafter adopted, and this certificate constitute the agreement between the Fraternal Aid Union and said member."

Section 20, chapter 206, Laws of Mississippi of 1916 (section 5192, Hemingway's Code), reads as follows:

"The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiary members."

Section 106 of the constitution and laws of appellant reads as follows:

"No officer or member of the supreme lodge, except the supreme president by dispensation, nor any local or subordinate lodge or any officers or member thereof or any organizer, deputy or agent, shall have authority to change, alter, modify or waive any of the provisions of this Constitution."

Section 53 of the constitution and laws of appellant reads as follows:

"If any member shall die or suffer injury in any way on account of any act on his part which is a violation of any law of the state in which he or she is, or of the United States, while engaged in the commission of a crime or while escaping from an officer of the law or in flight from arrest, he shall thereby forfeit all rights of membership and all moneys paid, and all rights under his certificate."

Section 62 of the constitution and laws of the appellant reads as follows:

"(d) If death of any person who now is or shall hereafter become a member shall be due to suicide, whether sane or insane, voluntary or involuntary, conscious or un-

conscious, the full liability of the association shall be the amount actually paid by the member to the benefit fund.

“(f) That each and every promise, waiver, guarantee or other matter set forth in the application and signed by the member is a part of the contract between the member and the association as fully as though fully set forth in the certificate issued to the member, the same as though they were a part of the Constitution of the association.”

The appellant in defense pleaded the general issue and special pleas setting up the several sections of its constitution and the above provisions from the application for insurance and the quotation from the policy in defense of the action, and also filed notice under the general issue setting forth in substance the provisions and averring breaches thereof by the deceased, and alleging that the deceased came to his death either by suicide by willfully jumping from the train, or that he was attempting to flee arrest and came to his death by reason of trying to escape arrest.

The replication of the appellee to these several pleas set up waiver and estoppel on the part of the appellant by reason of the fact that the agent of the appellant, the state manager, made out the application for the deceased, and that the deceased disclosed to the agent the real facts, and that the agent interpreted the questions in the application for the certificate by the deceased by stating that the questions referred to illnesses of a serious nature, and especially to those coming within a period of five years next preceding the time of the application for the certificate, and that the agent of appellant taking the application had full knowledge of the real facts as disclosed by the evidence, and by reason thereof the appellant had waived the provisions and was estopped by the conduct of its agent from relying upon the said defenses, and that the knowledge of the agent was the knowledge of the appellant.

Demurrers were filed to the replications and overruled by the trial court, and the cause was submitted to a jury, who found for the plaintiff on the issues submitted.

On the hearing the proof for the defendant on its affirmative defenses as to suicide and as to escaping arrest was the testimony of a post officer inspector who testified that he and another inspector entered the railway mail car on which the deceased was employed on the day of his death at Wiggins, Miss., and proceeded to examine the business of the mail service, and found in a compartment of said car certain letters which had been rifled or opened; that thereupon they informed the deceased that he could continue his run until he reached Gulfport, at which time he would be relieved of his key and commission as railway mail clerk and turned over to the proper authorities; that as they approached Landon, a flag stop on the Gulf & Ship Island Railroad, the deceased had placed the catcher arm, an appliance used on the mail car in the service for catching mail appended to a crane to take up mail without stopping the train, and that he was looking out of the car doors on approaching this station, and placed his hand on the catcher arm and swung or jumped out of the car, while the train was crossing a ravine or creek, and in falling or descending from the car to the ravine deceased struck a sill, which resulted in his death.

The proof for the appellant also consisted in the introduction of the application with the answers written therein containing the provisions therein set out, and the introduction of an application to the Lamar Life Insurance Company upon which a policy was issued, but which had been discontinued by reason of the nonpayment of the premiums, in which application deceased stated that he had suffered a broken leg or ankle in the year 1901, said application being made in 1907, and the application in the recent case, being issued in 1918, did not disclose this injury. The application in the present case stated that the applicant had one thousand dollars insurance in the Lamar

Life Insurance Company, which was not true in fact, because of the lapse thereof as above stated.

The appellee introduced the manager of the appellant, who made out the application of the deceased, who testified in support of the replication above set forth, stating that the applicant stated the facts to him, and that he knew of the injury and of the lapse of the policy, but that he put down the answer as he did for the reason that he thought there might be extended insurance keeping the policy in force, and also because it showed that the applicant had been approved as an insurance risk by an old line insurance company, and that he wrote the answers to questions with reference to medical treatment as he did because he did not regard slight illnesses of any importance, and that he so stated to the deceased in explaining the questions to him, and that it was the practice of all insurance agents in this territory not to note illnesses and injuries that were not of consequence or which were not regarded as serious.

The appellee also proved by a physician that the deceased had been treated at intervals for a period of four or five years for vertigo, which was described as being "swimming in the head," and as being a symptom produced by indigestion and toxins resulting from indigestion; that the effect of the vertigo was to cause blindness and swimming in the head, a flow of blood to the head, and a relaxation of the muscles.

The appellee also introduced a porter on the train from which the deceased fell or jumped who testified that he was on the steps of the colored passenger coach, which was next to the express car and about forty feet from the mail car, and that he saw the deceased when he fell; that he came out sideways and the porter thought at first that it was a mail pouch; that deceased's head struck the sill on the trestle, but his cap was not knocked off, and that when the car in which the porter was riding passed over the place where the deceased fell that deceased's body was "still jostling where he fell;" that the porter did not see

the body when it left the car, but saw it almost immediately thereafter. He was asked:

“Q. How near to the ground was it when you first saw the body? A. He hadn’t more than got out of the door; I don’t know whether he was clear out the door. Q. You didn’t see him when he left the door? A. I never seen his body—I didn’t see his body when it whirled out. Q. You said awhile ago you thought it was a mail pouch till it almost hit the ground? A. I says I thought it was a mail pouch? Q. Yes. Now you couldn’t swear whether he came out feet foremost or head foremost, could you? A. Yes, sir; because I know a man’s body from his head. Q. He was clear of the car and clear of the bridge when you saw him? A. No, sir.”

On redirect examination the porter stated:

“I don’t know whether he jumped out or fell out; I couldn’t say, because I was not in the car, and the door was too narrow for a person to lean around to see anybody. Q. How did his body go out? A. His body went out kinder sideways; that is the position I saw it; and he was just leaving the top of the door as I caught sight.”

The appellant insists that it was entitled to a peremptory instruction for several reasons, one of them being that the proof by the plaintiff in rebuttal or contradiction of the post office inspector is not sufficient for the jury to find that the deceased did not jump out of the car, and that there was in reality no conflict between the post office inspector’s testimony and that of the plaintiff upon this fact.

Taking the physician’s testimony as to the effect of the vertigo in connection with the testimony of the negro porter as to how the deceased’s body fell, we think there was such contradiction as would authorize a jury to find for the plaintiff on this issue. Taking all that all the witnesses said upon this proposition, we think the jury could draw a conclusion that the deceased fell from the car rather than that he jumped from the car, and as the jury so found by their verdict, and as the burden to show the fact on

this issue was on the defendant, this point is not well taken.

We come now to the effect section 106 of the constitution and laws of the appellant, and section 20, chapter 206, Laws of Mississippi of 1916 (section 5192, Hemingway's Code), have upon the application of the deceased.

It is earnestly insisted by the appellant that the testimony of the manager was incompetent because the language of section 106 of the constitution and laws of the appellant:

"No officer or member of the supreme lodge, except the supreme president by dispensation, nor any local or subordinate lodge or any officers or member thereof or any organizer, deputy, or agent, shall have authority to change, alter, modify, or waive any of the provisions of this constitution"

—prevents the act of the manager from being the act of the appellant. If this provision of appellant's constitution is given effect as written, no element of estoppel could ever be attributed to the appellant, nor could it be held to have waived anything unless the "supreme president" of appellant should waive it "by dispensation;" in other words, there would be no waiver except by the express order of the appellant's president amounting to a "dispensation."

The law of waiver and of estoppel does not depend upon contract. The waiver may be made by conduct and action as well as by words, and no contract can repeal the law upon this proposition. Estoppel is predicated upon the doing of a thing by a party which causes another person to act or change his situation by reason of such act of the other party as would make it inequitable or unjust to permit the party to assert to the contrary.

There must at all times be some person who can represent the appellant in such way as to create an estoppel or to create a waiver, and the provisions of the appellant's constitution above set out do not provide or leave room for this rule to operate. We do not feel that we have any

authority to eliminate a portion of the said section so as to make it stand. It must stand or fall upon its validity as written. This court has had occasion to pass upon this proposition before, and it has held that a company cannot eliminate the law so as to escape the consequences of its act that would result in waiver or estoppel if the company was an individual.

In the case of *London Guarantee & Accident Co. v. M. C. Railroad Co.*, 97 Miss. 165, 52 So. 787, it was held that a stipulation in a written contract to the effect that its provisions shall not be waived by parol is ineffectual, as much so as would be a parol agreement not to contract in writing. And that a stipulation in a contract executed by a corporation to the effect that its terms could not be waived by any agent or officer is not aided by the claim that the power to waive was confined to the corporation itself, since a corporation can act only by agents and officers. A clause relied on in that case reads as follows:

"The assured shall not voluntarily assume any liability, nor shall the assured, without the written consent of the company previously given, incur any expense or settle any claim except at his own cost, or interfere in any negotiation for settlement or any legal proceedings, except that the assured may provide at the time of the accident, such surgical relief as is imperative. Whenever requested by the company, the assured shall aid in securing information and evidence and the attendance of witnesses, and in effecting settlements and in prosecuting appeals."

And the policy contained a provision that its provision could not be waived by any officer or agent. In that case the railroad company had sued the Guarantee & Accident Company for money to reimburse itself for certain moneys paid out by the railroad company in settlement of certain personal injury claims, and the Guarantee & Accident Company's first defense was that the claim should not have been paid under the terms of the policy without the written consent of the Guarantee & Accident Company. The court in that case, quoting with approval from the

case of *Home Insurance Co. v. Gibson*, 72 Miss. at page 64, 17 So. at page 14, as follows:

"It is in vain to say that this clause does not seek to prevent the corporation itself from waiving a stipulation. The corporation acts only through agents; and, if 'no agent, no officer, and no other representative' can waive a stipulation, who is left to waive it for the corporation? This clause is a species of refinement by which the corporation withdraws within its invisible and intangible ideality when liability is sought to be imposed upon it, bound by the acts of no agent, officer, or other representative, but reaches forth therefrom with Briarean hands to receive the profits and avails of these same acts performed by these same 'agents,' as against those with whom those same agents have dealt. The refinement is too subtle for the practical affairs of actual life, and we repudiate it."

The court then quotes from authorities in this and other states to sustain its conclusion, and reversed and remanded that case for a new trial.

In the case at bar the state manager of appellant was appointed by the "supreme president" of appellant, and the "supreme president" had full control under its constitution and by-laws of the management of this department of the work, and selected and removed its managers and physicians, and passed upon the applications for insurance, and had full power to direct the manager's activities, and to make rules and regulations by which the manager would act and be governed. There is no definition of the manager's powers in the appellant's constitution and by-laws, but he acts for the "supreme president" in the performance of certain duties which are confided by the constitution and by-laws to the "supreme president." He was an agent of the appellant, and knowledge coming to him must be the knowledge of the appellant, as he was acting for the appellant under the direction of the "supreme president." This agent or manager testifies, showing that he had knowledge of the material matters upon which the policy was issued, and that he made out the application

on his interpretation of the meaning and purpose of the question propounded. He also testifies that the assured did not read the application and answers over, but signed them as written, according to his recollection.

It is said that the application agrees that the answers to the questions are to be treated as warranties, and that as a matter of fact the answers were not true as stated, and, regardless of its effect upon the risk, the policy is voided. The answers as written in the light of the interpretation placed upon the questions would not constitute a breach of warranty, but upon a literal construction of the questions would constitute breaches of warranty.

As the applicant was led by the agent of the appellant to place a construction on the questions and answers and was led to answer the questions on the theory that the appellant was seeking material facts, we think it is a case where the company would not be permitted to avail of the defense of warranties brought about in this manner, especially as to warranties having no real relation to the risk. The applicant had no power to select the manager, and we think the doctrine of warranties is not applicable and available as a defense under the facts shown in this record. There is much reason in the explanation of the manager that it would be impractical to note every slight illness or every consultation with a physician, and that it would not be the purpose of the appellant in writing insurance to seek information that would have no practical value.

In *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521, it was held that a printed provision in a policy of insurance that—"It is part of this contract that any person other than the assured, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured, . . . and not of the company, under any circumstances whatever, or in any transaction relating to this insurance"—cannot convert the agent who procured the application and made the contract of insurance on behalf of the appellant into an agent

of the assured. It is the duty of an applicant for insurance to disclose all facts material to the risk, but, if he does so, and the agent of the appellant, acting within the scope of his powers, deemed these matters immaterial, and so writes the answers in the application for the applicant. the appellant would not be permitted to defend on the ground that the answers were not true within the literal meaning of the words used in the application.

In the case of *American Life Ins. Co. v. Mahone*, 56 Miss. 180, it was held that, if the agent of an insurance company undertakes the preparation of an application for insurance in his company, and by mistake or omission fails to write down correctly the applicant's answer to a question propounded, the company will be bound by such answer, just as if it had been written down in the language used by the applicant, and presented thus to the company for its action.

In *Mutual Reserve Fund Life Association v. Ogletree*, 77 Miss. 7, 25 So. 869, this court held:

"If the agent of an insurance company be fully advised of the facts, and write or advise false answers to the inquiries contained in the written application, his principal cannot avoid the policy because of such answers."

In *Lewis v. Mutual Reserve Fund Life Ass'n*, 27 So. 649, this court held that, where on the death of the insured, an illiterate negress, the defendant company refused to pay the policy because of falsehood in answering certain interrogatories in the application, and the plaintiff, the beneficiary, gave notice of proof that the insured was old and unable to read, that all questions asked her she truthfully answered, that the application had not been read over to her or signed by her, and that she did not know its contents, and that the false answers were made solely through the fraud of defendant's agent taking the application, it was error to strike this notice from the files as insufficient, and to grant a peremptory instruction for the defendant. See, also *Phenix Ins. Co. v. Bowdre*, 67 Miss. 620, 7 So. 596, 19 Am. St. Rep. 326; *L. & L. &*

*G. Ins. Co. v. Sheffy*, 71 Miss. 919, 16 So. 307; *Big Creek Drug Co. v. Stuyvesant Ins. Co.*, 115 Miss. 561, 76 So. 548; *Stewart v. Coleman Co.*, 120 Miss. 28, 81 So. 653.

If the facts in this case showed that the deceased had written the application or had it done by his agent, and that the appellant had no knowledge of the facts misrepresented, the deceased and the beneficiary claiming through him could not set up that they had not read the application, but the facts in this case present an entirely different situation. The representations were not false if the questions called for the information which the state manager interpreted them to call for. This case must be treated in our opinion just as though the applicant for the certificate was dealing personally with the president and the president had performed the acts that the state manager performed. Certainly an insurance company could not be deemed to desire information as to insignificant and slight ailments which had existed a long time prior to the application. A fraternal insurance company ought to be held to be dealing fairly with its members, seeking information which is material to the risk and not weaving a web to entangle prospective members in. It is true parties have a right to make contracts, and they may choose their own terms and form of contract, and may impose such conditions and restrictions not violative of law or public policy as they may desire, but it is equally true that they may waive provisions of a contract, and that they may so act as to estop themselves from asserting a fact that they ought not to assert under the rules of fair conduct.

The learned circuit court, we think, reached the correct conclusions on the law of the case, and the facts are sufficient to uphold the verdict, and the judgment is affirmed.

*Affirmed.*

## LEE v. GREENWOOD AGENCY Co.

[87 South. 485, No. 21329.]

**BROKERS.** *Expenses incurred by owner's authority in canceling leases, recoverable, though no commission allowed.*

While no commissions are recoverable by a broker, where they are based on the amount received for the land by the owner, and the sale has failed through no fault of the owner, the broker may nevertheless recover expenses incurred by the owner's authority in securing options to cancel leases to enable the owner to deliver possession to the prospective buyer.

On suggestion of error. Suggestion of error sustained in part, and overruled in part. For former opinion, see 86 So. 449.

*Gardner, McBee & Gardner*, for appellant.

By way of reply to the brief for appellee, we wish to again emphasize the fact that appellee is in error in assuming that the contract in this case was for it to obtain a purchaser ready, willing and able to purchase on the terms proposed.

As a matter of fact, the contract sued on in this was made by a letter of appellee to appellant, dated 7th of December, 1918, in which it says: "We would be willing to undertake the sale of this place at the price of seventy-five dollars per acre, you to pay us for our services, a commission of two and one-half per cent on the amount you receive. But we must act immediately as the season is well advanced for making a deal of this kind."

To this offer, appellant replied, accepting the proposition as shown by his telegram which is as follows: "New York, December 16, 1918. Greenwood Agency, R. P. Farish, Secretary, Greenwood, Mississippi. You are authorized to proceed on basis your letter seventh.

(Signed) BLEWETT LEE." (R. 15.)

This then, was the contract made between appellant and appellee, and is the contract that was never carried out, and therefore, appellee is not entitled to recover, because the contract was never completed, and it was upon the theory of a completed contract that the contract was made.

Appellee in its brief, speaks of appellant having withdrawn the plantation from sale. By reference to appellant's letter dated December 30, 1918, r. p. 10, it will be seen that a limit was fixed as to when this property should be sold, that is to say, appellant declined to allow any longer than the 15th of January, in which the property should be sold, and it was on the 20th of January, 1919, that he wrote the letter declining to permit appellee to have any further connection with the sale of the property. Appellee in its brief, on page 4, says: "There was a very serious defect in the title."

The question naturally arises, what was that defect? The correspondence shows that the alleged defect was nothing more nor less than a *lis pendens* notice filed on the *lis pendens* docket of Leflore county, showing that suit had been brought in Lowndes county, in which the title to this property was affected. Since that time, the suit which was then pending in Lowndes county notice of which was filed on the *lis pendens* docket in this county, has been decided, as we have shown in our original brief, in favor of appellant, that is to say, the decision of this court sustained the demurrer and the decision of the court below, holding that the alleged suit affecting this title was no lien or cloud whatever upon appellant's title to "Buckhorn Plantation."

However, for the sake of argument, admit it as a fact that appellant's attorney refused to certify to the abstract, because of this *lis pendens* notice, then what is the effect of a *lis pendens* notice? To what extent and how does it affect the title to real estate, and in what way was that *lis pendens* notice a defect in appellant's title?

Quoting from Maupin on Marketable Titles to Real Estate, 2 Ed., page 292, we find this author lays down the

rule: "A mere *lis pendens* without evidence that it is well founded is no encumbrance." (30 Pac. 727.) The same author on page 732 says:

"It is obvious that a title cannot be rendered unmarketable by a mere naked adverse claim to the premises without color of title; otherwise a purchaser might always avoid performance of his contract by procuring a stranger to set up such a claim. *Young v. Lillard*, 1 A. K. Marsh (Ky.) 482. In the note it is said an alleged adverse claim unsustained by record evidence does not make a title doubtful. *Allen v. Phillips*, 2 Litt. (Ky.) p. 1. A purchaser may be compelled to take the title if it appears that the adverse claim has been decided, barred or released. *Jackson v. Murray*, 57 B. Monroe (Ky.), 184, 17 Am. Dec. 53. It is not a conclusive objection to the title that a third party has filed a bill against the seller, claiming a right to the estate, but the nature of the adverse claim will be looked into (1 Sugden, Vendors, 8 Am. Ed., p. 589) where the purchase money was detained in court until the rights of an adverse claimant could be determined, in a suit which was then pending.

This same author says on page 781: "But it has been held that a *lis pendens* without evidence to show it is founded upon a just claim, is no such incumbrance as will justify a purchaser in refusing to perform the contract. Citing *Wilsey v. Dennis*, 44 Barb. (N. Y.) 354. This case shows that the claim represented by the *lis pendens* must be valid and legal.

Defective Title. Ruling Case Law lays down the rule, that neither a pending action brought to establish title to, or a lien upon land, nor a duly recorded notice of its pendency, of itself, makes the title defective, or creates a lien upon the land." 17 R. C. L., p. 1026, sec. 20; *Hayes v. Nourse*, 11 Am. St. Rep. 7000.

We therefore contend that this alleged *lis pendens* notice does not show any defect of title, and in fact does not affect the title at all to the extent of preventing a purchaser willing to purchase, if he had ever intended doing

so. The mere filing of a *lis pendens* notice, without more, does not make the title defective or unmarketable. 39 Cyc., p. 1464; 30 N. E. 264.

"The law does not require the title to be absolutely free of suspicion or possible defect, but, only requires a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, and in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept." 39 Cyc., 1456; 135 A. S. R. 342; 114 A. S. R. 723; 69 L. R. A. 785; 8 L. R. A. (N. S.) 139.

Marketable Title. "To render a title marketable, it is necessary only that it shall be free from reasonable doubt, a purchaser is not entitled to demand a title absolutely free from every possible technical objection, but only such title as a reasonable, well informed and intelligent purchaser, acting upon business principles, would be willing to accept." *Cummings v. Dolan*, 132 A. S. R. 986, and notes thereto. We commend this case on account of the copious notes which illustrates every phase and feature of a marketable title, and which, we say, shows that the alleged defect in this case was imaginary, rather than real.

The telegrams and letters in the record in this case, show all of the dealings between appellant and appellee, and in the light of the authorities which we have quoted we claim first, that there was no defect in the title because of the alleged *lis pendens* notice; second, the alleged *lis pendens* notice of the suit in Lowndes county has since been eliminated by the decision of this court in the case of *Thos. G. Blewett et al v. Blewett Lee, et al.*, No. 21220, decided by this court some time last summer; third, there was never any sort of opportunity given appellant to show that the alleged defect, of title was absolutely without any merit, and that he was in a position to give to the alleged purchaser a perfect record title, independent of his ability financially to warrant the title as against any alleged defect.

We, therefore, ask that the decree of the court below may be reversed and this bill dismissed.

*E. L. Mounger*, for appellee.

Suppose the purchaser was produced, ready, willing and able to purchase and the appellant arbitrarily and without excuse refused to consummate the sale. The appellant would receive nothing, but could it be contended that the appellee was entitled to nothing. What is the difference.

Some one must suffer loss. Either the agent who performed his undertaking and failed in nothing must lose his time, expense and the value of his services, or the seller who received these services and who caused this expenditure of time and money, but who could not or did not carry out his undertaking, must pay.

The appellee had a right to rely on the validity of the appellee's title and did rely on it. There was a very serious defect in the title. This was no feigned or captious objection to the title. It was raised by the appellant's own attorney and he refused to certify the title. It was natural that the purchaser should decline to take the land with a suit pending. The appellant must have known of the pendency of this suit. The friends who might try to break up the trade, referred to in appellant's letter of January 9th, (page 23) are evidently the complainants in the suit in which the *lis pendens* notice was filed. The appellee had no knowledge or notice of any defect and the appellant is liable for the commissions earned and the expenses incurred pursuant to his contract. *Roberts v. Kimmons*, 65 Miss. 333, 3 So. 736; *Yoder v. Randol*, 3 L. R. A. (N. S.) 5 and note; *Little v. Fleishman*, 24 L. R. A. 1182, and note; *Backrenridge v. Clairidge & Paine*, 43 L. R. A. 610, and note; *Leonard v. Vaughan*, 57 L. R. A. (N. S.) 717, and note; *Dean v. Williams*, 106 Pac. 130.

There was an implied contract that the appellant had the ability and could confer upon the purchaser a perfect

title to the property. *Gauthier v. West*, 45 Minn. 192, 47 N. W. 656. The mere fact that the contract contains a stipulation that the commissions are to be paid out of the purchase price will not prevent the broker from recovering the same when the sale is prevented by reason of the defective title of his principal." *Cheatham v. Yarbrough*, 90 Tenn. 77, 15 S. W. 1076. See, also, *Berg v. San Antonio St. Ry. Co.*, 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929.

So, in *Stevenson v. Morris*, 69 Miss. 232, the commissions were to be paid on the money realized from the sales made to purchasers found by the agent. The purchasers were found, but the manufacturer was unable to ship the goods in a reasonable time and the sales were lost, and no money was realized from the sales. Yet, it was held that the agent could recover. See, also, *Nagle v. McNorton*, 65 Miss. 197; 2 Corpus Juris, 768; Agency, secs. 436, 437; 2 Corpus Juris, 770, notes, 6 & 8.

But the appellant contends he was not given time to perfect the title. The appellee was not under any obligation to wait until the title could be perfected, nor was the appellee or the purchaser to wait the outcome of the suit. Nothing is said in the contract about this. All parties were proceeding on the assumption that the title was good and valid. It is true that the appellant telegraphed that there was nothing to the suit and the opinion of Mr. Lee, splendid lawyer that he is, was entitled to weight, but very many splendid lawyers have thought there was nothing in the suit of the other fellow, and, to their sorrow, have found otherwise; and it is not surprising that the purchaser should have been unwilling to reply implicitly on Mr. Lee's opinion and take the property when Mr. Lee's own attorney refused to certify the title as good. Moreover the appellant made no effort to remedy the defect, but only offered his personal guaranty in lieu of a perfect title. The purchaser was under no obligation to buy or the appellant to sell a law suit. 36 Cyc., 632.

The appellant, in his letter of January 20th, page 38, recognized the defect and withdrew the property from sale. The case of *Hudson v. Watson*, 26 Miss. 357, cited by counsel, has no application. It simply decides as to when a party can put the other in default for not tendering a deed. The appellant made no offer to cure the defect, but on the contrary, withdrew the lands from sale. He made no effort whatever and there is no merit in counsel's complaint that he was not afforded sufficient time. *Kimbrough v. Curtis*, 50 Miss. 120; *Robinson v. Harbour*, 42 Miss. 800.

The case of *Johnson v. Sutton*, 94 Miss. 544, is not applicable to this case. In that case the terms upon which the lands were to be sold were not specified and actual sale was to be made; while in the case at bar, as in *Cook v. Smith*, 119 Miss. 375, the terms of the sale were specified and the agent performed his duty and was entitled to his commissions where he produced the purchaser ready, willing and able to buy upon the terms specified.

The appellant agreed to the sale to this purchaser and executed the deed and, in his letter of January 11, 1919, pages 27 and 28, he recognizes that appellee had earned its commissions and was entitled to the expenses incurred and states the amounts. It was the fault of no one but the appellant that the sale was not consummated, and the appellant cannot plead his own wrong. *Bailey v. Padgett*, 70 So. 637; *Sharpley v. Lee Moody & Co.*, 44 So. 650; *Long v. Griffith*, 113 Miss. 659.

We, therefore, respectfully submit that appellant's demurrer should have been overruled and the decree of the court below should be affirmed.

W. H. COOK, J., delivered the opinion of the court.

On a former day of this term the judgment of the lower court overruling a demurrer to the bill of complaint was reversed, and the bill of complaint dismissed, and counsel for appellee now suggests and earnestly insists that we erred in so doing, and especially in denying appellee the right to recover the amount paid out for expenses incur-

red at the instance and request of appellant in procuring agreements for the cancellation of certain leases on the lands which appellee undertook to sell.

We have given this record a careful reconsideration, and we adhere to the former opinion, in so far as it denies to appellee the right to recover commissions on the proposed sale. However, it appears from the bill of complaint and exhibits that the lands which appellee undertook to sell were covered by lease contracts, and both parties recognized the necessity of securing an option to cancel these lease contracts in order that appellant might be able to deliver possession of the lands in the event a sale should be consummated. It further appears from the correspondence between the parties that appellant was advised that it would be necessary to incur considerable expense in securing the cancellation of these leases, and that he authorized appellee to proceed to secure an option to cancel these leases and to incur the expense incident thereto.

The appellee cannot recover the expenses incurred solely in showing the property and negotiating a sale, but, in negotiating the proposed sale, there was no duty resting on the agent to secure these options to cancel the existing leases, and we conclude that appellee is entitled to recover the expenses incurred for that purpose.

Since the demurrer filed by appellant was general, the former judgment, reversing this case and dismissing the bill, is vacated, and the cause is affirmed and remanded, with directions that appellee be permitted to recover the expenses, if any, incurred in securing options to cancel the existing leases.

Suggestion of error sustained in part and overruled in part.

*Sustained in part.*

*Overruled in part.*

## RAMSAY v. RAMSAY.

[87 South, 491, No. 21673.]

1. APPEAL AND ERROR. *Matters not affecting appellant's rights not considered.*

An assignment of error will not be considered, when the decision of the question it presents will have no effect upon the rights of the appellant.

2. DIVORCE. *Chancery court may allow such alimony as is equitable and just with regard to circumstances.*

The power of a chancery court to award alimony to a wife in a divorce proceeding is measured by section 1673, Code of 1906 section 1415, Hemingway's Code), and is to make such allowance therefor as may seem equitable and just, having regard to the circumstances of the parties and the nature of the case.

3. DIVORCE. *Alimony may be awarded wife, although husband without property.*

Alimony may be awarded the wife in a divorce proceeding, although the husband is without property and must support himself and pay the alimony out of his future earnings.

DIVORCE. *Financial situation of parties should be considered.*

When the husband is without property and must support himself out of his own earnings, and the wife is able to and does earn something by her own labor, that fact should be taken into consideration in determining what amount the husband should contribute to her support, unless the prospective earnings of the husband are sufficient in amount to make it equitable and just for him to bear the whole burden of the wife's support.

5. DIVORCE. *Husband's failure to pay alimony under decree prima-facie evidence of contempt.*

The failure of the husband to comply with the decree providing for the payment of alimony is prima-facie evidence of contempt, to purge which the burden is upon him to prove his inability to pay.

6. DIVORCE. *Husband should not be committed, when he can pay alimony only of future earnings.*

A husband should not be committed to prison until he pays the

arrears of alimony allowed to the wife, when he has no property and can pay the alimony only out of his future earnings.

7. DIVORCE. *Husband not in contempt for failure to obtain sureties, when he is unable to do so.*

Under section 1673, Code of 1906 (section 1415, Hemingway's Code), the court may, "if need be, require sureties for the payment of the sum so allowed" to the wife as alimony; but, when the giving of such sureties is ordered, the husband is not in contempt until he fails to obey the order, and not then if his failure to obey the order resulted solely from his inability to do so.

8. DIVORCE. *Court awarding alimony may fine husband for wilful failure to pay.*

The court which rendered a decree awarding alimony to the wife may enter a fine against the husband for failure to pay the alimony, when the failure to pay was wilful.

APPEAL from chancery court of Forrest county.

HON. D. M. WATKINS, Chancellor.

Bill by Cannie H. Ramsay against N. K. Ramsay for divorce. Decree for plaintiff. From an order committing defendant to jail for failure to pay alimony, he appeals. Reversed and rendered.

*Robert L. Bullard*, for appellant.

The court below erred in overruling appellant's motion to quash the information and citation; (2) It was error to fine the appellant fifty dollars; (3) It was error to commit appellant to jail for his failure to pay past due alimony, and for his failure to give security for it, and (4) It was error to decree against the appellant the payment of fifty dollars per month hereafter as permanent alimony.

As the same legal principle underlies all three of the first assignments above stated, for brevity they will be discussed together, that legal principle is stated as follows: Before one may be imprisoned for his failure to comply with a degree for payment of, or security for, alimony, it

must first appear that he was able to comply with the decree, and contemptuously refused to do so, when he had the means of complying.

Authority in support of this is abundant and without conflict. I think, directly pertinent are the following: *Hamblin v. Hamblin*, 107 Miss. 113; *Mills v. The State*, 106 Miss. 131; *Edminson v. Ramsay*, 34 So. 455; *Webb v. Webb*, 37 So. 96; 13 Corpus Juris, 75, 76, 77.

The defendant should be discharged if the evidence leaves it doubtful as to his present ability to comply with the order. Such being the law it is submitted that each act of the lower court was glaringly erroneous. In the first place it was error to refuse to quash the information and citation. 3 Am. & Eng. Ency. Law 79; 13 Corpus Juris, pages 64, 65, 66, 67, 68.

But the evidence does not begin to show that it was ever humanly possible for him to have complied with the decree. Search the record and if one bit of evidence can be found tending to show that Ramsay had the means of complying with the decree, then let the case be affirmed and let him go back to jail. Appellee cannot point out any such evidence. It is like the history of aphidians in Erin, "There aint none."

The fine of fifty dollars is something new under the sun. I cannot find law or precedent for it; no, nor any against it, for that matter, as it seems never to have been resorted to before. I therefore pass it on to this court as something new.

(4) It is now submitted that it was error to decree the payment of fifty dollars or any sum, against appellant as permanent alimony. The whole question of alimony was before the court in this proceeding to be dealt with fully, and is therefore now before this court for review and correction, if the act of the lower court in decreeing alimony was erroneous.

In some jurisdictions nothing but property owned by the husband is considered in the allowance of alimony. In others it is held that income from earnings may be con-

sidered. It seems to be an open question with this court, but our statute, section 1673, Code 1906, makes it the duty of the court to have regard to the circumstances of the parties. If this court adopts the reasoning of those which restrict consideration of the circumstances of the husband to his property nothing more is to be said. But can it be said that Ramsay has, or ever had, any income upon which any allowance could be based? For more than four years he was in the army. When he came out he had but ninety dollars and his personal effects. Since that time he is shown not to have been able to earn enough to live and keep out of debt. Where income is made the basis of the allowance, "It must be estimated at the amount of the previous year." 9 C. J. 225. Out of his earnings his debts and obligations should be deducted. 19 Corpus Juris, 256. It is also held that the court should take into consideration the fact that the husband, in order to earn what he gets, is compelled to live more expensively than the wife. *Louis v. Louis*, L. R., 1 P. & D. 230.

Will the court now approve such showing as Mrs. Ramsay makes as a basis for the allowance of permanent alimony? Counsel has much to say about the needs of the wife and the obligations of the husband. These things are always present. Her needs do not seem to be any greater than his. She married him four months and sixteen days before he was discharged from the army, on the 9th of December, 1918. All this was before her eyes. He was empty handed and she knew it. She had notice to begin with of all she now complains.

It is now submitted that he should be discharged from custody, that the decree appealed from should be reversed and a decree entered here denying permanent alimony, at least until such time as she may hereafter be able to show that she is entitled to it on account of his ability to pay it.

*Currie & Currie*, for appellee.

We deem it proper to observe that in our opinion the record of this appeal necessarily presents two questions:

First, the question of the inherent power of a chancery court to compel and enforce obedience to its decree by compelling the execution of the bond required in the decree rendered in this hearing and committing the appellant herein to jail until such time as he should execute the bond or until the further order of the court.

Second, the separate question whether the chancery court has power to punish by fine or imprisonment the appellant herein for the contempt of the court, the court having decreed upon the hearing that the appellant herein had contemned the court and its valid orders and decrees by his failure, neglect and refusal to pay the alimony adjudged against him.

We assert that the first question herein stated is necessarily involved for the reason that the court on the rehearing did not nullify the original decree and enter a new one, but simply modified the original decree by reducing the penalty in the bond, and in the exercise of its inherent power to enforce and compel obedience to its decree, remanded the appellant herein to the custody of the sheriff of Forest county until such time as that he should execute the bond or until the further order of the court, this court bearing in mind that the petition of the appellant herein for his release from imprisonment thereunder, on a writ of *habeas corpus*, had just prior to the hearing in which this decree was rendered, been dismissed and the original decree under which he was originally imprisoned in default of such a bond remained in force and effect and was in full force and effect except to the extent to which it was modified by the decree in this case, that is, the penalty in the bond had been and was reduced to the amount of five hundred dollars and the other provisions of the decree authorizing the imprisonment remained unaltered or changed, and therefore the decision of this honorable court rendered on the 24th day of May, 1920, and reported in 84th Southern at page 455, was *res judicata* upon this question.

The decision of the court in this case was also *res judicata* upon the question of the ability of the appellant herein to give bond. The court in the syllabus of the case said: "Decree awarding alimony is conclusive as to defendant's ability to give bond."

In a *habeas corpus* proceeding to obtain his liberty the ability of relator to execute a bond in accordance with the decree of the chancery court awarding alimony was conclusively adjudicated in the decree for divorce and alimony."

The appellant herein can draw no aid from the original bill of complaint of the allegations therein, first, because the allegations are in the alternative; and second there was no appeal from the final decree in the original suit and the record of the proof made by the appellees herein in the trial of the original suit with reference to the ability of the appellant herein to pay the alimony adjudged against him and to execute the bond required of him to guarantee its payment is not before this court, and the conclusive presumption is that the chancery court of Forest county had before it ample proof to require and justify a decree requiring the execution of such a bond. *Edmonson, Sheriff, v. Ramsay*, 94 So. 455. The court will bear in mind that Ramsay, the appellant herein, had procured his temporary release from imprisonment under the original decree on the order rendered on his petition for the writ of *habeas corpus* and the natural and necessary effect of the reversal of that order by this court and the dismissal of the petition for the writ of *habeas corpus* was *ipso facto* to remand the appellant herein to the custody of the sheriff of Forrest county.

The court will observe that the chancery court did not undertake upon the hearing of the cross-petition of the appellant herein to render a new decree and did not render a new decree but merely modified the terms and conditions of the original decree, and in law the original decree stands the same today except to the extent and in the manner in which it was modified.

Upon the second question or proposition hereinabove stated, and to express the views thereon of our friend Judge BULLARD in his own language we quote the following from his brief: "The fine of fifty dollars is something new under the sun. I cannot find law or precedent for it; no, nor any against it, for that matter, as it seems never to have been resorted to before. I therefore pass it on to this court as something new."

The language of the decree against which the above quotation is directed is the following: "And after hearing and considering the same it is ordered, adjudged and decreed by the court that the said N. K. Ramsay is in contempt of court for his failure, neglect and refusal to comply with the terms and conditions of said decree so rendered on the said 26th day of September, 1919, in the case of *Mrs. Cannie Hartzog Ramsay v. N. K. Ramsay*, and for said contempt it is ordered, adjudged and decreed that the said N. K. Ramsay be and hereby is sentenced to pay a fine of fifty dollars."

Upon the facts which had been introduced in evidence before the court, and the court having all of the parties before it and having seen and observed the manner of the appellant herein and having weighed and considered all of the testimony solemnly adjudged the appellant to be in contempt of court and imposed this moderate fine, and counsel says without authority of law, which statement to us, and we believe to this court, is "stranger than fiction."

This court in its opinion in the Ramsay case, which counsel for the appellant must have read, cited the case of *Watson v. Williams*, 36 Miss. 331, in which this court in its opinion said:

"The power to fine and imprison for contempt, from the earliest history of jurisprudence had been regarded as a necessary incident and attribute of a court, without which it court no more exist than without a judge. It is a power inherent in all courts of record, and co-existing with them by the wise provisions of the common law. A court without the power effectual to protect itself against the as-

saults of the lawless, or to enforce its orders, judgments or decrees against the recusant parties before it, would be a disgrace to the legislature and a stigma upon the age which invented it." Why, a justice court in this country can fine and imprison a man for contempt.

In 1920, the legislature of the state of Mississippi enacted a chapter of law in this state the first section of which reads as follows: "Section 1. Be it enacted by the legislature of the state of Mississippi that any husband who shall, without just cause desert or wilfully neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances; or any parent who shall, without lawful excuse, desert or willfully neglect or refuse to provide for the support and maintenance of his or her child or children under the age of sixteen years in destitute or necessitous circumstances shall be guilty of a felony and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars or imprisoned in the penitentiary, not exceeding two years, or both, with or without hard labor, in the discretion of the court."

The court will observe that the legislature in the first part of this statute and speaking with reference to the wife, used the words: "without just cause," and in the second part of the statute speaking with reference to the child used the words "without lawful excuse." We ask that what lawful excuse does this record show for the desertion of his infant child by the appellant herein? What lawful excuse could there be for a man earning and spending upon himself each month the sum of one hundred fifty dollars to desert his child.

It is true that this statute did not go into effect until June first, 1920, and was not in effect at the time this case was tried, but it is in effect now and the record in this case shows that the appellant herein obtained this appeal with a *supersedeas* and that therefore he is still neglecting and deserting his infant child, and in passing upon the

merits of this appeal this court will properly take into consideration the provisions of this statute.

The court will observe, as we think we have, that counsel for the appellant herein, in the preparation of his brief and argument, carefully and cautiously neglected to mention or refer to this infant child and addressed all of his comments toward and his arguments against the mother, but we do not propose to allow the child to escape the notice of the court. The child is interested in this proceeding; it is a party to it. The decree adjudging alimony was for its support as well as its mother's. The bond required of the appellant herein was for its protection as well as its mother's.

In a case of this character this court will not take any notice of the motion to quash the citation and the suggestion upon any such technical grounds as are set out in the motion. The suggestion and the citation served its purpose in bringing the appellant herein before the court and in submitting to it the question tried and determined by it whether the appellant herein had contemned the court.

The court of its own motion could have sent out and brought him before it and laid down the charges against him and tried him upon them.

Can a man be permitted, to the exclusion and desertion of his child, to spend each month upon himself the sum of one hundred fifty dollars in living approximately that much in high priced hotels and restaurants and escape the just punishment of the law. At rock bottom this is the question in this case which the court in its decision must answer.

SMITH, C. J., delivered the opinion of the court.

The appellant and the appellee became husband and wife in December, 1918, and have one child. In September, 1919, the court below granted the appellee a divorce, awarded the custody of their child to her, and directed the appellant to pay the appellee permanent alimony in

monthly installments of seventy dollars each for the support of herself and their child, and required the appellant to execute a bond to secure the payment thereof in the sum of one thousand dollars. The appellant, in default of the execution of this bond, was committed to prison, and his fruitless effort to obtain a release therefrom in a *habeas corpus* proceeding will appear from the case of *Edmondson v. Ramsey*, 84 So. 455. The bond seems never to have been given, but the appellant was released from prison, and paid two and a part of the third of the appellee's monthly allowances.

In May, 1920, the appellee filed a petition in the court below, praying that the appellant be cited to appear and show why he should not be adjudged in contempt for failing to comply with the decree directing him to make the monthly payments to her. Though no order so to do appears in the record, the sheriff who served the citation on the appellant seems to have taken him into custody, for he required of him a bond to appear before the court and answer the appellee's complaint. On the return day of the citation the cause was continued at the request of the appellant to a later day before the chancellor in vacation, and the appellant was admitted to bail upon the execution of a bond therefor in the sum of one thousand dollars.

Complaint is made because of the requirement of these bail bonds, but we are not called on to determine whether or not they should have been required, for the reason that any question relative thereto has become of no value to the appellant, as he complied with the conditions thereof by appearing at the court when required thereby, and was afterwards taken into custody by the sheriff in obedience to the court's final decree, as will hereinafter appear.

When the case came on for trial the appellant filed an answer to the appellee's petition, setting forth that his failure to comply with the decree of the court was caused by reason of the fact that he was wholly without the means so to do, and also prayed the court to modify its former decree "to the extent that he may be relieved from

sentence of imprisonment on account of giving security for the payment of said alimony, and that said decree may be further modified by relieving him from the payment of alimony, at least until he is able to support himself."

It appears from the evidence that the appellant has no property, and must support himself and pay the appellee's alimony from his earnings. He is an automobile mechanic and salesman, and earned during a portion of the time since the rendition of the decree in the divorce proceedings the sum of one hundred and fifty dollars a month, but had earned nothing whatever for the last three months preceding his citation for contempt. He claims to have spent the money earned by him in necessary living and running expenses, but the only specific evidence relative thereto, other than that of the money paid to the appellee hereinbefore referred to, is that he lived most of the time in expensive hotels, for the reason, according to his own testimony, that he could not obtain more modest quarters. The appellant and the appellee are both able-bodied, and the appellee not only can work, but was earning at the time of the trial sixty-five dollars a month as a saleswoman in a department store. The appellant has made several bail bonds in this matter since the rendition of the divorce decree, one of which was made by a former army comrade, and another by his employer, and others procured by his attorney.

On this evidence the court below entered a decree adjudging the appellant guilty of contempt for failing to comply with the requirements of the decree rendered in the divorce proceeding, and entered a fine against him in the sum of fifty dollars, the payment of which was "suspended pending good behavior and the faithful performance by the said N. K. Ramsay of the terms and conditions of this decree hereinafter imposed upon him." The appellee's alimony was reduced from seventy dollars to fifty dollars a month, the bond required of the appellant was reduced from one thousand dollars to five hundred dollars, and he was directed to pay the appellee two hun-

dred and fifty dollars of the amount he was in arrears under the original decree, and was committed to jail until he should pay the two hundred and fifty dollars and execute the five hundred dollar bond. From this decree he appealed to this court.

The power of the court to award alimony to a wife in a divorce proceeding is measured by section 1673, Code of 1906 (Hemingway's Code, section 1415), and is to make such allowance therefor as may seem equitable and just, having regard to the circumstances of the parties and the nature of the case.

The circumstances surrounding the parties to this proceeding are that neither of them have any property and each is able to work, but that the appellant has no property and the appellee is able to earn something by her own labor will not release the appellant from the obligation, assumed by him when he entered the marital relation, to contribute to her support if her necessities so require, particularly in view of the fact that she is caring for his child. 19 C. J. 255; 2 Bishop on Marriage and Divorce (5th Ed.), section 446.

When the husband is without property and must support himself out of his own earnings, and the wife is able to and does earn something by her own labor, that fact should be taken into consideration in determining what amount the husband should contribute to her support, unless the prospective earnings of the husband are sufficient in amount to make it equitable and just for him to bear the whole burden of the wife's support. This, we presume, the court below did, and we cannot say that the allowance to the appellee of fifty dollars a month is excessive. The purpose sought to be accomplished by this proceeding is to coerce the appellant into complying with the decree awarding alimony to the appellee; the power so to do, if statutory authority therefor is necessary, being probably conferred upon the court below by section 560, Code of 1906 (Hemingway's Code, section 320), and cer-

tainly by section 999, Code of 1906 (Hemingway's Code, section 719).

The appellant's failure to comply with the decree directing him to pay alimony to the appellee placed him *prima facie* in contempt of court, and devolved on him the burden of proving his inability to make the payments directed, and had he failed to meet that burden the court below would have committed no error in committing him to jail until he complies with its decree. But that burden was fully met by him, for it appears from the evidence, without conflict, that he has no money at all and no means of obtaining any except by his own labor. This being true, he cannot pay the alimony or any part thereof until he earns the money necessary for that purpose, and, if he should be confined in prison, he will not while there be able, of course, to earn any money at all, so that to commit him to prison would defeat the purpose sought to be accomplished.

Under section 1673, Code of 1906 (Hemingway's Code, section 1415), the court may, "if need be, require sureties for the payment of the sum so allowed" to the wife as alimony, but when the giving of such sureties is ordered the husband is not in contempt until he fails to obey the order, and not then if his failure to obey the order resulted solely from his inability to do so. It is clear from the evidence that the appellant has been unable to give the bond required of him in the original decree and will be unable to give that required in the decree appealed from unless some friend should come to his relief and assume the obligation for him without security therefor, and such a friend he does not seem to possess. He should not have been committed to prison, either until he shall pay the arrears of alimony or give the bond required.

The appellant has a right to pay his necessary living expenses out of his earnings before paying anything on the decree awarding alimony to the appellee; but he must live economically, and whenever he has any money not then required for his living expenses, it is his duty to pay

it on the decree, and any failure so to do will be a contempt of court, punishable as such. In order to purge himself of contempt in not complying with the decree of the court, the appellant should not only have disclosed the full amount of money earned by him, but also have shown that it was consumed in paying his bare living expenses. In order to do this he must fully disclose for what the money earned by him was spent, and not only did he fail to do this, but it is apparent from the evidence that he made little, if any, attempt to save anything from his earnings, but, on the contrary, he seems to have lived in a style wholly unwarranted by his financial condition. Unless he has made an honest effort to pay the alimony awarded to the appellee he is in contempt, and, since it does not appear from the evidence that he made any such effort, the court below committed no error in imposing on him a fine of fifty dollars, for the court is not limited to imprisoning a person who disobeys its decree until he complies therewith, but may also fine him for having disobeyed the decree.

Since the appellant's financial condition is such that he cannot be imprisoned until he pays the arrears of the installments of alimony, or until he executes a bond so to do, the only way in which he can be coerced into paying the alimony is to hold over him the power to punish him for contempt when it shall be made to appear that he has not paid any of an installment of the alimony, but could have done so, had he so desired. Whether the court below was authorized to suspend the collection of the fine seems not to be objected to, and will not be determined.

For the error in committing the appellant to prison until he shall have paid the arrears of alimony and executed the bond required of him, the decree of the court below will be set aside, and a decree entered here in accordance with that rendered below, with the omission of the clause referred to.

*Reversed and remanded.*

SHIREMAN *et al.* v. WILDBERGER *et al.*

[87 South, 131. No. 21350.]

1. **BROKERS.** *When broker knows of defect in title, undertaking is to sell what owner has; owner bound to disclose facts which would clear title.*

Where a real estate agent undertakes to make a sale of a piece of property knowing that title is defective, he undertakes, in effect, to sell what the owner has, provided the defect is such as cannot with reasonable effort be overcome by the owner. In such case it is the duty of the owner to make reasonable effort to perfect the title, and, if that may be done by disclosing facts within his knowledge that might remove the difficulty and he fails to do so, the owner cannot escape the payment of fees or commissions earned by the agent in bringing buyer and seller together on terms agreed on.

2. **SUNDAY.** *Owner not relieved of liability to broker because of signing contract on Sunday.*

Where a principal and agent made a contract on a secular day by which the agent agreed to sell real estate for the principal on given terms, and such agent on secular days procures a purchaser and drafts a written contract, which the principal modifies and signs on Sunday, and which the agent on a secular day gets the purchaser to accept and sign on a secular day, the principal cannot escape liability for paying the agent's commission earned because of the fact that the principal signed the contract on Sunday.

APPEAL from chancery court of Coahoma county.

HON. G. E. WILLIAMS, Chancellor.

Action by R. H. Wildberger and others against E. C. Shireman and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

*Brewer, Brewer & Brewer, J. N. Flowers, Ellis B. Cooper and L. R. Ramsey, for appellants.*

*J. W. Cutrer, Sam C. Cook, Jr., J. C. Cutrer and Montgomery & Crisler, for appellees.*

No brief found in the record for counsel on either side.

ETHRIDGE, J., delivered the opinion of the court.

Wildberger and the Shiremans entered into a contract by which Wildberger undertook to sell certain farming properties. Under the contract made Wildberger did not have the exclusive right to make the sale, but another party had been given a right to make a sale also, which fact Wildberger knew. Wildberger employed another real estate agent to assist him in making the sale, and this party took up with certain persons the subject of sale and procured a contract for the sale of the lands, which contract in its final form was approved by the Shiremans. When this contract was put in final form it had come to the knowledge of Shireman and of Wildberger that the other agent, a Mr. Wilson, had undertaken to make a contract with Cox & Ellison of Memphis, Tenn., but in making said contract he had departed from his authority and made the contract contrary to the authority vested in him. And these parties were threatening to bring suit for specific performance of their contract, and did institute a suit for that purpose. In the contract between the appellees and Shireman it was provided that Shireman should furnish an abstract showing title, etc. There was delay in furnishing the abstract and before the abstract was furnished the suit was filed seeking specific performance. When this suit was filed the Shiremans took no steps to secure its dismissal, nor did they bring the facts to the attention of Cox & Ellison until after the purchaser had declined to accept the deed unless the suit was dismissed. This did not occur until in January following the making of the contract some months prior thereto.

When the agents had secured the original contract from its buyers, a conference was held between the agents and

the Shiremans as to the rights of Cox & Ellison to hold the lands under their contract with Wilson, and Wildberger expressed the opinion that they could not maintain such contract, but requested the Shiremans, inasmuch as he was interested in the subject-matter, to secure the advice of a disinterested attorney. This conference was on Saturday evening, and on the following morning, being Sunday, the Shiremans had a conference with an attorney who was disinterested, who advised the Shiremans that Cox & Ellison had no right to hold them on the contract, but also advised them that no one could prevent Cox & Ellison from instituting a suit. Thereupon on Sunday a contract was drafted in which the original contract was changed in some particulars, and the real estate agents took up with their buyers the proposition of accepting the contract as modified, which they did, the contract being signed by both parties.

After January 1st, when the buyers procured by Wildberger and his associate declined because of the suit to accept the deed and complete the contract by making the payments and going into occupancy, the Shiremans offered to execute an indemnity bond guaranteeing the results of the litigation, but the purchasers refused to accept the bond and refused to accept title unless the suit was removed or disposed of. Thereafter Shireman went to Memphis, had a conference with Cox & Ellison, and then disclosed to Cox & Ellison his version of the facts and made a sale to Cox & Ellison on more favorable terms to Shireman than the contract made with the buyers procured by Wildberger and his associates. Mr. Cox testified on the trial that he accepted the Shireman version as against Wilson's representation, and, if the facts had been brought to their attention before that, they would have dismissed the suit. There was a judgment for Wildberger, and the Shiremans appeal from said judgment.

The appellants earnestly insist that Wildberger should recover nothing because the defect which prevented the consummation of the contract was known to him before

the purchasers procured by him were secured, and that the rule, where a sale of land negotiated by a broker fails because of the inability of the owner to convey a good title, the broker cannot recover his commissions, as the weakness in the title depends upon the facts, of which the broker had notice when he made the sale, applies and prevents a recovery. The principle stated is recognized, and its application in a proper case will undoubtedly defeat a recovery. Wherever a real estate agent undertakes to make a sale of a piece of property knowing that the title is defective, he undertakes, in effect, to sell what the owner has, provided the defect is such a one as cannot be overcome by reasonable effort on the part of the seller. In the present case the title was good. It is undoubted that Wilson's sale was unauthorized as being a departure from his authority to make the sale and imposed no obligation upon the Shiremans to execute the deed on conditions which they had not authorized. The Shiremans were advised by competent counsel before executing the contract secured by Wildberger and knew that he was under no obligation to sell under the terms of that contract. He made no effort to bring the facts to the attention of purchasers secured by Wilson and made no effort to get them to withdraw the suit, or to make an adjustment looking to a settlement of that suit. The proof shows that if he had done so the suit would have been withdrawn. It is argued by the appellants that he was under no obligation and had no power to determine whether the suit would be withdrawn, and that he was not compelled to buy off litigants to secure the title, but that when he offered to indemnify the purchaser that he had done all that could reasonably be required; that all that he could do under the circumstances was to pay for the dismissal of the suit. We do not agree with this view. It was the duty of the Shiremans to bring the facts to the attention of the complainants in that suit, and to make some reasonable effort at getting this cloud removed from his title. We do not hold that he was under any duty to pay the

complainants in that suit any money for peace, but we do hold that it was his duty to bring the facts within his knowledge to their attention, and, if that would satisfy them that their suit was without merit, the suit might have been, and according to the testimony would have been, removed, and the sale consummated.

As to the contract being made on Sunday, we do not think the facts in this case preclude a recovery upon that ground. The contract between Wildberger and the Shiremans was made on a secular day, and Wildberger and his agents had secured prospective purchasers under terms authorized to be given to the buyers on that contract and a draft of the proposed contract had been prepared by Wildberger and his associate, but this contract was modified by Shireman on Sunday, and afterwards Wildberger and his associate took up with the buyers the proposition of accepting the contract in the modified form, which the purchasers did, and the contract was made and consummated on a secular day. This does not preclude Wildberger from maintaining an action for his commissions. The judgment of the court below is affirmed.

*Affirmed.*

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SMITH v. PERKINS, et al.

[88 South. 531, No. 21566.]

**COSTS.** *No attorney's fee held allowable for defending judgment in injunction suit on appeal.*

Where an injunction is sued out to restrain sales of property under mortgages, deeds of trust, or judgments, the 5 per cent. damages allowed under the provision of section 623, Code of 1906, (section 383, Hemingway's Code), for the dissolution of such injunction includes all damages, and no more can be recovered, and this is true even though there is an appeal to the Supreme Court from the judgment dissolving the injunction, and, consequently, where the 5 per cent. damage has been recovered in the court below, no attorney's fee will be allowed here for defending the judgment on appeal.

On respondents' motion for an attorney's fee. Motion overruled.

For former opinion, see 88 So. 177.

ETHRIDGE, J., delivered the opinion of the court.

The appellant filed a bill to enjoin a sale under a mortgage. The injunction was dissolved by the final decree of the chancery court which decree allowed five per cent., from which judgment an appeal was prosecuted with a *supersedeas*, and which was affirmed by this court on a former day of this term, and suggestion of error overruled. Now the appellee files this motion for an attorney's fee for defending the appeal.

Section 623, Code of 1906 (section 383, Hemingway's Code), reads as follows:

"When an injunction, obtained to stay proceedings on a judgment at law for money, shall be dissolved, in whole or in part, damages at the rate of five per centum shall be added to the judgment enjoined, or to so much thereof as shall be found due, including the costs; and the clerk of the chancery court shall certify such dissolution to the clerk of the court in which the judgment was rendered, who shall thereupon issue execution for the damages, as well as for the original debt and costs. Damages at the same rate shall be allowed upon the dissolution of injunctions to stay sales under deeds of trust, or mortgages with power of sale; and such damages may be added to the debt, and collected by the sale of the property, or execution may issue from the chancery court for the same, together with the costs of suit, unless the value of the property, the sale of which was restrained, be less than the amount of the debt, in which case the damages shall be computed on the value of the property, to be ascertained and determined by the chancellor; and in all cases upon the dissolution of an injunction the damages may be ascertained by the court or chancellor, or upon reference to a master, and proof, if necessary, and decree therefore be made, and execution be issued thereon."

This section has been constructed in a number of cases so as to make the five per cent., allowance for damages to include all damages. In the case of *Williams v. Bank of Commerce*, 71 Miss. 858, 16 So. 238, 42 Am. St. Rep. 503, this court so held. In *Mortgage & Trust Co. v. Fitzpatrick et al.*, 16 So. 877, the court again held that it was in lieu of all damages, and where they were not claimed, none could be allowed. *Williams v. Bank*, *supra*, was attacked in *Nixon v. Seal*, 78 Miss. 363, 29 So. 399, but the court adhered to this decision. We think these cases are still authorities, and announce the correct construction of the statute. There seem to have been some cases in which damages have been allowed contrary to this section, but in these decisions the attention of the court was not called to the fact that the damages were governed by the statute, and no point was made against the allowance of attorney's fees. We do not think these decisions have overruled former decisions or changed the construction of the statute.

The appellee, having secured the full five per cent., allowed by the statute, is entitled to no further allowance, and the motion will be overruled.

*Overruled.*

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CRUDUP v. ROSEBOOM.

[88 South. 497, No. 21634.]

**APPEAL AND ERROR.** *Motion attacking correctness of decision in effect a suggestion of error; motion to modify judgment held in effect an additional suggestion of error.*

A motion which only attacks the correctness of the decision is in effect a suggestion of error. Where a decision on appeal has been rendered against a party, and where a suggestion of error has been filed by such party and overruled, and where the judgment entered by the clerk is in accordance with the decision, no further attack on the decision is permitted, and a motion to modify the judgment, which only challenges the correctness of the decision of the court, is in legal effect an additional suggestion of error, and will be stricken from the files by the court of its own motion.

On motion to modify the correct judgment. Motion stricken.

For former opinion, see 87 So. 424.

ETHRIDGE, J., delivered the opinion of the court.

This cause was affirmed on a former day at this term of court, and a suggestion of error overruled.

This so-called motion to modify and correct the judgment heretofore rendered is, in effect, nothing more than a suggestion of error. It was insisted in the motion that the record shows that the appellee was indebted to the appellant, and that we should have rendered judgment for the amount the appellee owed the appellant as evidenced by exhibits to the bill, which the answer of the defendant admits to be owing. The exhibits are, first, a note for three thousand, eight hundred and seventy-five dollars dated September 1, 1919, due one year after date; and, second, a check for five hundred dollars, payable to the order of appellant, dated September 6, 1919. The bill was filed on September 17, 1919, and consequently the promissory note was not then due, nor does the record show that the check was presented for payment, but; on the contrary, it shows it was not presented for payment, and if it had been presented it would have been paid. Besides the complainant's bill does not rely on the note or the check, but repudiates their acceptance by the appellant. Paragraph 20 of the bill reads as follows:

"Complainant now states that she has met every promise, fulfilled every agreement, and complied with every wish of the defendant in the matter of the purchase of the lands hereinbefore mentioned, except she has not accepted the note and check hereinbefore delivered her by defendant in settlement of the difference between complainant and defendant, and has merely held such papers at the request of the defendant until some future date, when defendant promised to give complainant a deed to the lands hereinbefore mentioned as having been purchased from the defendant. Therefore complainant does not believe that defendant intends to comply with her

many promises, contracts, and agreements, and she is advised to deliver to the clerk of this court the aforesaid note and check, there to remain subject to the demands of the defendant, as this complainant does not care to deliver these papers to the defendant, when defendant keeps requesting complainant to carry them home and return later with them, as for many reasons it would be most disagreeable for complainant to do this."

It is insisted that, if we do not modify the judgment, the judgment now affirmed will constitute *res adjudicata* against the note and check. The effect of the check is to create a debt payable on demand, and no demand has ever been made; nor was the note due. Consequently no action could be maintained on either, and no plea of *res adjudicata* can be interposed. We have said this much on this motion so that no confusion could arise as to any possible action on the note or check. The motion in this case is not authorized under any pleading known to this state. As said in *Couret v. Conner*, 118, Miss. 598, 79 So. 801, a motion to correct judgment only exists as provided in section 1016, Code of 1906 (section 736, Hemingway's Code), and in cases where the clerk fails to enter judgment in accordance with the opinion of the court. When a party has had one suggestion of error, and that has been overruled and judgment has been entered in accordance with the decision of the court, he has no further right to be heard, and a motion filed in violation of the rules of practice should be stricken from the files, which course will be taken in the present case. So ordered.

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HUMPHREY *et al.* v. SEALE.

[87 South. 446. No. 21621.]

TENANCY IN COMMON. *Occupancy by one tenant with payment of taxes insufficient as ouster.*

The occupancy and cultivation of land by one tenant in common and her husband, together with the payment of taxes on the land and the purchase of outstanding tax titles, does not amount to an ouster of the other tenants in common.

APPEAL from chancery court of Pearl River county.

HON. D. M. RUSSELL, Chancellor.

Separate suits by J. F. Humphrey and others against Mrs. Nancy B. Humphrey Seale. Decree for defendant, and plaintiffs appeal. Reversed and remanded.

*D. E. Sullivan*, for appellant.

The court will see from the foregoing statement that Nancy B. Seale, one of the tenants in common, in all of this land in controversy, and a tenant in common in actual possession of the land and getting the uses and benefits arising therefrom with the consent of her cotenants permitted all of this land to sell for taxes except that part sold by J. F. Wheat to Eli Seale and actually bought in a part of it at the tax collector's sale and bought another part of it from the state after it had been forfeited to the state for taxes, and that later her husband, Eli Seale, while living upon this land and getting all its uses and benefits and paying the taxes thereon for a number of years, permitted the northwest quarter of the southeast quarter, section 23, to be sold to the state for taxes in the year 1893 for the taxes of 1892 and later, the husband, Eli Seale, acquired whatever title the state had by a purchase from the state's vendee. It was the duty of Nancy B. Seale and her husband Eli Seale, as well, after he came upon the scene, to keep the taxes paid on this land. They not only breached this duty and betrayed the trust relation which they bore to the other parties in interest but they are now actually endeavoring to take advantage of their betrayal of this trust and hold this land as their own under said tax sales as herein shown. The law is so well settled that the tenant in common cannot acquire title to the common estate, at tax sale, that citation of the authorities seems needless. The rule is that it is the duty of all the tenants in common to pay the taxes on the common estate, and no one tenant can buy the land at a tax sale and acquire a tax title for the reason that it is his duty

125 Miss.]

Brief for Appellee.

to pay the taxes in the first instance and prevent the sale. If one tenant in common does buy the land at a tax sale, the title does not thereby pass to him but the purchase merely operates as a redemption of the land and the payment of taxes, and the title remains in the several cotenants as before. We call the court's attention to the following authorities, on this point: *Harrison v. Harrison*, 56 Miss. 174; *Mcgee v. Holmes*, 63 Miss. 50; *Fox, et al. v. Coon, et al.*, 64 Miss. 465; *Wise Bros. v. Hyatt*, 68 Miss. 714; *Cohea, et al. v. Hemingway, et al.*, 71 Miss. 22.

It seems that Nancy B. Seale and her husband, Eli Seale, undertook to make assurance doubly sure in getting the title to this land through tax sale. The defendant herself, bought that part of the land which she had allowed to sell for taxes, and after she married her husband, Eli Seale, very kindly undertook the job of getting the balance of the land sold for taxes after they married. They seem to have two strings to their bow with the hope that if Nancy's string broke, that at least Eli's would hold. It is well settled law in this state as well as many others, that what the wife, who is a cotenant cannot do, in the way of cheating her cotenants out of the land by buying at a tax sale and buying up the tax title, her husband cannot do for her. It is held, that, on the ground of public policy, whatever disqualifies the wife from acquiring the title from her cotenants also disqualifies her husband. We call the court's attention to the following authority in this state and in other states on this point. *Robinson v. Lewis*, 68 Miss. 69, and also numerous authorities in note to 116 Am. St. R. P. 371.

*Mounger, Ford & Mounger*, for appellee.

As to the parcels of land claimed by the appellee, Mrs. Nancy B. Seale, we freely admit that the rule of law applicable in her case, is the rule of law which obtains in the case of one tenant in common claiming title against her fellow tenants under a deed of conveyance in severalty

125 Miss—14

for the tract of land. This rule is nowhere better stated than in the case of *Highnite v. Highnite*, cited copiously in appellant's brief, and reported in 65 Miss. at page 447. The court there speaking through COOPER, C. J., said:

"The complainants should have had a decree for partition. There is no sufficient evidence of an adverse holding by the cotenant in possession, to put in operation the statute of limitations as against the others. True it is, that he bought the land, or took a deed therefor from the widow of the common ancestor, but there is no evidence that complainant had notice thereof or ever heard that she claimed to be the owner of the whole interest in the land. A tenant in common out of possession, has a right to rely upon the possession of his cotenant as one held according to the title and for the benefit of all interested until some action is taken by the other evidencing an intention to assert adverse and hostile claims."

The converse of this rule is true, that a tenant in common in possession denying his fellow-tenant's title and claiming title in severalty with the knowledge of his cotenants, may acquire title after the lapse of the statutory period.

We understand the rule of law to be as stated in the *Highnite* case, that where a tenant in common in possession of land, begins an adverse claim against his cotenant, that it is necessary before the statute of limitations shall begin to run, that the cotenants of such tenant, shall have notice or knowledge of such adverse claim. This rule is also stated in the case of *Bentley v. Callaghan*, 30 So. 709, where it is said that as between cotenants such adverse possession, must be with such actual notice to the cotenants or shown by such acts of repudiation of their claim, as are equivalent to actual notice to them.

This rule is well stated in *Ruling Case Law*, Vol. 1, at page 742, where it is stated: "A cotenant's sole possession of the land becomes adverse to his fellow tenants by his repudiation or disavowal of the relation of co-tenancy between them; and any act or conduct signifying his in-

tention to hold, occupy and enjoy the premises exclusively, and of which the tenant out of possession has knowledge, or of which he has sufficient information to put him upon inquiry, amounts to an ouster of such tenant."

Now we are sure that appellant's counsel will not contend that appellee did not in the years 1881 and 1882, when she purchased this land, repudiate and disavow the relation of cotenancy and begin to claim in hostility to that of her cotenants.

If it were required in behalf of Eli Seale that he show the same repudiation that would have been required of his wife and the same amount of notice that would have been required of her, then we say that the proof overwhelmingly would show both of these facts. However, the rule of law as applied to these parcels of land, is correctly stated in the case of *Gardner v. Hinton*, reported in 86 Mississippi at page 604, where the rule is stated to be:

Adverse possession in this class of cases does not depend upon actual notice. The principle which requires actual notice or acts of repudiation equivalent thereto, applies only to cases where there is some relation between the occupant and the holder of the legal title, which imposes upon the occupant the obligation of giving notice, either actually or shown by such acts of repudiation of their claim as are equivalent to actual notice, as a condition precedent to the assertion of any hostile claim by him.

Bearing in mind that neither the appellee, Nancy B. Seale, nor the appellants, had ever claimed these parcels of land but had always, prior to 1889, recognized the title of J. F. Wheat, then, it follows that Eli Seale, upon his purchase of this land, was under no obligation to anyone. His possession of the land was from its inception, hostile to any claim by appellee or the appellants, and while it was shown that appellee and the appellants had both actual notice of his claim and knowledge of such facts as necessarily charged them with notice, yet the law did not put this obligation upon him. While it was abun-

dantly shown that appellants knew of this claim and had never disputed it nor made an adverse claim of any kind whatsoever, yet as to these lands claimed by Eli Seale, the decree was correct and would have been correct had no notice or knowledge whatever been shown or imputed to any of the appellants.

The rule of law stated by counsel for appellants, as set out in the case of *Robinson v. Lewis*, 68 Miss. 69, to the effect that the husband or wife of a tenant in common is disqualified from purchasing an adverse title to the other co-tenants, is correct, but this rule of law has no application here, for the reason that Nancy B. Seale had acquired, in 1893, the title to this particular forty-acre tract of land through more than twelve years' adverse possession, and the appellants had lost whatever claim of title they ever had to this tract of land and the appellee, Nancy B. Seale, was not a tenant in common in 1893, with the appellants in this case. The rule of law cited by counsel for appellants, that the three-year statute of limitations is not applicable to a tax sale made in favor of one co-tenant, is correct, but there is no life in this proposition of law, for the appellants, for the simple reason that in 1913, when Eli Seale purchased this tax title from E. F. Tate, his wife had been in the actual possession and occupancy of this land for more than twelve years before the tax sale in March, 1893, and had acquired title by adverse possession, and she had also been in possession of this land continuously from the year 1893 to the year 1913, and for a period of twenty years, and her title was undoubtedly vested by adverse possession. If the tax title were void for any reason, then Nancy B. Seale, is the present owner. but if the tax sale were valid, then Eli Seale is the owner. and in either event, the chancellor was correct in his decree in dismissing the complainant's bill, because as recited in the decree, the proof showed that their claim of title to any interest in this land had been wholly lost, abandoned and waived.

SAM C. COOK, P. J., delivered the opinion of the court.

The record on appeal covers two cases which were tried together on the same state of facts by the chancery court of Pearl River county, Miss.

J. F. Humphrey, Annie Paine Fornea, and Mary A. Fornea filed their bill in the chancery court of Pearl River county against Nancy B. Humphrey Seale, and charged that the complainant J. F. Humphrey and the other complainants and the defendant were the only son and daughters of Basil H. Humphrey, who died intestate on the 28th day of February, 1863, owning the following described land now situated in Pearl River county, Miss.

Lots 1 and 6 and the north half of lot 5 in section 22, township 3 south, range 18 west, and the entire southwest quarter of section 23, township 3 south, range 18 west, and the west half of the southeast quarter of section 23, township 3 south, range 18 west, now situated in Pearl River county, state of Mississippi. They charged that the above-described land descended to the complainants and the defendants as tenants in common in equal parts, and that they still owned and held the land as tenants in common at the time of the filing of the bill. They prayed that the land be sold, and that the proceeds be divided equally among all the parties interested. At the trial the suit was dismissed as to all the land in section 22, and the suit proceeded as to the land in section 23.

Nancy B. Humphrey Seale answered the bill, and admitted that the complainants and the defendant were the sole surviving heirs of Basil H. Humphrey. She denied that the land descended to the complainants and to her as tenants in common, and denied that Basil H. Humphrey was the owner of land at the time of his death. She alleged that all that part of the land in section 22 and the north half of the southwest quarter and the north half of the south half of the southwest quarter of section 23 was bought by her at a tax sale on the 28th day of April, 1881,

and that immediately after the delivery of the deed to her she took adverse possession of the land, and continued to hold and claim it adversely ever since. She alleged that she did not claim the land in section 22 or the south half of the south half of the southwest quarter of section 23, but that her husband, Eli Seale, purchased this land from J. S. Wheat. The original answer is silent as to the west half of the southeast quarter of section 23, township 3 south, range 18 west. She does not deny the allegations of the bill as to this last-described land, nor does she in any way make any explanation about it in the original answer. She does not allege in her answer as to the land she claims under a tax sale that she took adverse possession of this land with the knowledge of her cotenants, or that she in any way brought home to them knowledge of the fact that she was claiming this land adversely; in fact she denied that the land was held, or ever had been held, by the parties as tenants in common. Later the defendant filed an amended answer, and denied that Basil H. Humphrey died seized and possessed of the west half of the southeast quarter of section 23, township 3 south, range 18 west, and also that she did not claim, at the time of filing the suit, the south half of the southwest quarter of the southeast quarter of section 23, but the same was claimed by her husband, Eli Seale, who purchased it from J. F. Wheat on March 23, 1899, and that Eli Seale had been in adverse possession of said land since that time. She further alleged that the north half of the southwest quarter, section 23, was sold to the state for taxes prior to the year 1862, and that she bought the same from the state on July 12, 1882, and that she has had adverse possession of the same continuously since that time. She alleged that the northwest quarter of the southeast quarter, section 23, was sold to the state for taxes in 1893, and that on February 22, 1910, the state sold the land described as the northwest quarter of the southeast quarter, section 23, to E. F. Tate, and on February 3, 1913, E. F. Tate conveyed the northwest quarter of the

southeast quarter of section 23 to Eli Seale, and that Eli Seale went into immediate possession of the land after purchasing it, and remained in possession for more than three years, and defendant pleads the three-year statute of limitations of actual possession.

The other suit filed in said court was by J. F. Humphrey, Anna Paine Fornea, Mary A. Fornea, against Nancy B. Humphrey Seale, and the Salmen Brick & Lumber Company, Limited, a corporation, and is in regard to timber on part of the land in the first suit. The bill charged that the three complainants and the defendant Nancy B. Humphrey Seale were the sole heirs of Basil H. Humphrey Seale, deceased, being the only son and daughters of the deceased, and that Basil H. Humphrey died the owner of the southwest quarter of section 23, township 3 north, range 18 west, then in Hancock county, but now in Pearl River county, Miss., and that the land descended to the complainants and the defendant Nancy B. Humphrey Seale, as tenants in common, and that the complainants and the defendant are still the owners as tenants in common of said land.

The bill charged that the defendant Nancy B. Humphrey Seale had recently sold and conveyed to the defendant the Salmen Brick & Lumber Company, Limited, all of the merchantable timber on said southwest quarter, section 23, with fifteen years to cut and remove the timber from said land. The bill charged that the defendant Nancy B. Humphrey Seale only had an undivided one-fourth interest in said land and timber, and therefore had no right to convey the entire interest to the Salmen Brick & Lumber Company, Limited, and that such conveyance constituted a cloud on the title of the complainant. Relief was sought by the bill.

The two defendants filed a joint answer to this bill. They admit that Basil H. Humphrey died the owner of the southwest quarter of section 23, township 3 south, range 18 west, as charged in the bill, and that the said land descended unto the complainants and the individual defendant as

tenants in common. They set up title to the timber in the Salmen Brick & Lumber Company, Limited, and title to the land in the defendant Nancy B. Humphrey Seale, except the south half of the south half of the southwest quarter of section 23, which they allege is owned by Eli Seale, the husband of Nancy B. Humphrey Seale. They set up title in the defendant Nancy B. Humphrey Seale, to the north half of the southwest quarter and the north half of the south half of the southwest quarter of section 23, township 3 south, range 18 west, by tax collector's deed to her made the 20th of April, 1881, and adverse possession by her under said tax deed, but the answer does not allege that notice of her claim of adverse possession of this land was brought home to the other tenants in common. The answer sets up title in the south half of the south half of the southwest quarter of said section 23, in Eli Seale, the husband of the defendant, by a deed from B. F. Wheat dated March 23, 1899, and adverse possession of the land by Eli Seale under said deed. The answer does not show how Wheat acquired title to this land.

A plat is attached in the case of *J. F. Humphrey et al. v. Nancy B. Humphrey Seale* under her tax deed, and described as the north half of the southwest quarter and the north half of the south half of the southwest quarter and the north half of the southwest quarter of the southeast quarter, section 23, and also showing the land claimed by her husband, Eli Seale, as the south half of the south half of the southwest quarter and the northwest quarter of the southeast quarter and the south half of the southwest quarter of the southeast quarter, section 23. The land claimed by the defendant Nancy B. Humphrey Seale, bought at tax sale amounts to one hundred forty acres, and the land claimed by her husband, Eli Seale, bought from individuals, amounts to one hundred acres. The land on which the timber was sold by Nancy B. Humphrey Seale and her husband to the Salmen Brick & Lumber Company, Limited, is described as the southwest quarter of section 23, and all of this land is claimed by Nancy B.

Humphrey Seale by virtue of her purchases at tax sales, except the south half of the south half of the southwest quarter which is claimed by her husband, Eli Seale, as already stated.

The record discloses that the claim of title propounded by Nancy B. Humphrey Seale to the land in controversy rests upon a tax collector's deed for a part of it, and upon a deed from the state for the remainder, the state's claim being based upon a tax sale, and both of the tax sales occurred while Nancy B. Humphrey Seale was occupying the land. As we read the record, all of the land in controversy originally belonged to the father of the appellants and of the appellee, and that they were his sole heirs after the death of his widow, and therefore tenants in common of the land. When the land was sold for taxes Nancy B. Humphrey Seale was living on the land and making no claim of ownership thereto except as a tenant in common. She never claimed that she lived on the land long enough since purchasing it at the tax sales to perfect her title by adverse possession.

All of the parties lived on the land for several years after the death of their father, but afterwards they all moved away except their mother and Nancy. After this Nancy and her mother paid the taxes, and it seems that they cultivated some of the land. After the other members of the family went away, until 1880, when a part of the taxes was not paid on a part of the land and it was sold for the taxes of 1880, Nancy bought the land at the sale. In February, 1882, Nancy married Eli Seale, who came to live with her on the land, and they have lived there since that time, and used the same for their support. In 1893 a part of the land was sold to the state for taxes. In 1913 the state conveyed the land to one E. F. Tate, who afterwards in 1913 conveyed the same to the husband of Nancy.

We have thus far gone into the details of the facts to show how the land was occupied and the payment of taxes and the failure to pay the taxes upon a part of the land,

and the acquirements of these titles by Nancy and her husband. The parties to this suit were tenants in common of the landed estate of their deceased father, and they all, of course, possessed the coequal right to live upon and cultivate the land. The land was not of great value for agricultural purposes, and it appeared that the appellee cultivated that part of the land which was worth cultivating, and sold a part of the growing timber, or such part of same as was consistent with good husbandry.

Under the facts it seems to us that under the circumstances there was nothing to put the other tenants upon notice that the tenants in possession were claiming, or would claim, the land as their own. Under the law it was the duty of all the tenants in common to pay the taxes, and no one tenant in common can acquire a tax title, since it is the duty of all to pay the taxes. *Harrison v. Harrison*, 56 Miss. 174; *McGee v. Holmes*, 63 Miss. 50.

Nancy Seale bought a part of the land which she had allowed to sell for taxes. Afterwards her husband bought a part of the land which had been forfeited for taxes. We are of the opinion that the husband was also disqualified to set up the title acquired by him. *Robinson v. Lewis*, 68 Miss. 69, 8 So. 258, 10 L. R. A. 101, 24 Am. St. Rep. 254; *Hoyt v. Lightbody*, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 371, 8 Ann. Cas. 984.

To sum up, we believe that the facts of record do not warrant a reasonable belief that the appellees were holding the possession adversely to their cotenants. There was nothing to put them upon notice of an adverse claim of title to the land. On the contrary, every fact and circumstance is entirely consistent with occupancy and use of the lands as tenants in common. Giving due weight to every fact, the appellants did not understand, and reasonably so, that the occupancy and use were subservient to the relationship of tenants in common.

The assumption of witnesses in the immediate neighborhood is not impressive. Their understanding of ownership was based largely, if not entirely, on the living on the

place and cultivation of the land, and the sale of some of the lumber.

We are therefore of the opinion that the facts and circumstances do not warrant a finding that there was ouster.

*Reversed and remanded.*

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MCPHERSON *et al.* v. RICHARDS *et al.*

[87. South. 469. No. 21584.]

**PUBLIC LANDS.** *Board of supervisors cannot superimpose on a seven-year lease of sixteenth section land an option to release at a stipulated rental.*

The statute authorizing the lease of sixteenth section does not empower the board of supervisors to superimpose upon a seven-year lease an option to the lessee to re-lease the land at a stipulated rental. The statute (chapter 40, Laws 1898) merely gives the lessee a preference to re-lease. A failure to comply with the original lease takes away the option.

APPEAL from chancery court of Quitman county.

HON. G. E. WILLIAMS, Chancellor.

Suit by J. J. McPherson and others against Tom Richards and others. Decree for defendants, and plaintiffs appeal. Reversed and remanded.

*P. H. Lowrey*, for appellant.

The original lease was and is void, from the beginning, for two reasons. First, the board of supervisors had no right to make a lease for more than one year, except on the recommendation of the heads of families of the township. Second, they had no right, even if they had the consent of the heads of families, to make a lease for more than fifteen years.

The law governing at that time was Laws of 1898, chapter 20, page 62, amending section 4149, of the Code of 1892, and section 4159, of the Code of 1892. The law governing in 1911, was Code of 1906, sections 4700 and 4711. The board of supervisors, or any interested person may bring suits of this character, Code 1906, section 4698; *Osbourn v. Hinds County*, 71 Miss. 19; *Wright v. Lauderdale County*, 71 Miss. 800; *Carroll County v. Jones*, 71 Miss. 947; *Boliver County v. Coleman*, 15 So. 107. The title of sixteenth sections and authority of supervisors, to deal with them. *Jones v. Madison County*, 72 Miss. 777; *Jeff Davis County v. James*, 49 So. 611.

While the board of supervisors are authorized to lease sixteenth sections, they cannot lease them for more than one year without consent obtained and certified according to the statute, of the heads of families of the township.

The consent of the heads of families is jurisdictional and must be shown by the record. *Boliver County v. Coleman*, *supra*. In matters of this character nothing can be presumed in favor of the jurisdiction, or the right to make the lease. *Lester v. Miller*, 76 Miss. 309; *Craft v. DeSoto County*, 79 Miss. 608. If the board of supervisors had authority to make the lease for more than one year, under the action of the heads of families certified by the trustees, by the clear provision of the statute (Act 1898, page 62) they had no right to lease the land for more than fifteen years. The statute expressly says that lands not in a city, town or village shall be leased for a term not exceeding fifteen years. The lease in the case at bar is a lease for twenty-two years. The statute provides that in case of uncleared lands there may be a lease for a term of not exceeding seven years, in consideration of the clearing and improvements, and that said lease may be made with the condition that the lessee shall have the preference to lease the same for another term of fifteen years, or less, at an annual rental to be agreed upon as in other cases of leasing. The board of supervisors in this case proceeded on

the idea that their right to allow a preference for an additional term authorized them to make at one and the same time an unconditional lease for seven years and fifteen years additional, and that they could then anticipate both that the land would be cleared and taken into cultivation by the lessees within the seven year term, and also fix, seven years in advance, what the reasonable rental value of the land would be for the fifteen succeeding years. This is clearly not the language, or meaning, or spirit of the statute. If the legislature had so intended they certainly would have said that the board of supervisors might at the same time lease the land for a term of seven years in consideration of clearing and improvements, and for an additional period of fifteen years for an annual rental, then and there to be agreed upon. This would have been a foolish statute, and it should not be presumed, against the clear language of the statute that the legislature so intended.

The primary meaning of prefer is to place in advance, or to regard or to esteem one thing more than another. It is a word so frequently used in reference to matters of this kind, as to have a fixed meaning. Mr. Black in his law dictionary says that to prefer is to give advantage, priority or privilege.

No man who rents his land for one year, with a preference to the tenant for another year at a rental to be agreed upon, would understand, or consider that he had made a two-year lease, but he would understand that he had made a one-year lease and that the tenant would have the preference over any other person to lease the land the next year at such rent as he could get from the third person, or at such rent as they might then agree upon. It is perfectly clear that the board of supervisors in the case at bar undertook to make an authorized lease, very much to the detriment of the patrons of the public schools of this township.

W. E. Denton, for appellee.

The lease involved in this controversy was made in April, 1902; and this case, being a matter of contract, is of course governed by the statutes in force at that time which were chapter 123, Code of 1892, and the amendment of section 4149, thereof by chapter 40, page 62, of the Acts of 1898. The first lease of the land involved herein which was at that time uncleared and situated in a dense delta wilderness, was made directly under this amendment of 1898. The order of the board of supervisors for the making of this lease to Tom Richard is found on page 31, and the lease to Richard made under said order is found on page 34 of the record.

The main objection urged by appellant against the validity of this lease is that the consent of the heads of families in the district was not sufficiently evidenced by the certificate of such consent appearing on page 34 of the record. When this certificate is carefully read however, it shows a perfect compliance with section 4159, Code of 1892, which provides the method of calling such meetings and obtaining the consent of heads of families, and surely must have been prepared by some one familiar with the law who had this statute before him. It provides that at such meeting the trustees shall take the sense thereof as to whether the lands shall be leased for a term of years; and this is just exactly what the certificate shows was done. It is true that the certificate does not recommend the exact number of years to be embraced in the term, but there is no statute or other authority anywhere requiring or even permitting the heads of families to determine the length of the term and unless such consent was required by law, it was absolutely unnecessary. *Jones v. Madison County*. 72 Miss. 777; *Lauderdale County v. East Miss. Mills*, 18 So. 94.

In fact, the matter of fixing the length of the term is expressly left to the board of supervisors alone by section 4154, Code of 1892, which provides that the superintendent

of education shall lease such lands with the approval of the board of supervisors, for the term of (the board) shall direct. "Section 4150, Code of 1892, gave boards of supervisors complete jurisdiction and control over all matters pertaining to sixteenth sections; and of course no exception to this general rule can be made unless expressly provided for by law; and no exception or limitation whatever has been provided anywhere limiting their right to fix the length of the term allowed by law, after they have once obtained the consent of heads of families to lease for a term of years."

At this meeting of heads of families only two questions could be or were considered by them, to-wit: (a) Should the land be leased for one year without consent, or, (b) Should it be leased for a term of years?

It is clear from their report that they wanted it leased for a term. If they had wanted it merely rented for one year of course they knew that no consent was necessary, but they say in their report that they took the sense of the meeting as to whether the land should be leased for a term of years, and they consented and agreed and recommended that said section sixteen be leased to some suitable person. The use of the word "lease" in itself shows that they did not have in mind a simple renting for one year. The word "lease" as generally understood and used means a letting for a term of years; and in the delta especially it means a letting for a number of years in consideration of clearing and improving the land. When they consented to this lease for a term of years, that of course meant and they had in mind any term allowable by law. This appears even more clearly from the testimony of Ben Booth, one of the trustees when the case of *Bolivar County v. Coleman*, 71 Miss. 832, was decided in 1894, this testimony *aliunde* the record was incompetent, but thereafter this rule was changed. Acts 1902, chapter 78, page 130, which is still in effect.

The consent of the heads of families and trustees of the district to this lease is further evidenced *aliunde* the rec-

ord by the fact that for seventeen years it was acquiesced in by everybody, including Mr. McPherson who is the moving cause of this litigation and who procured only four other citizens to join him in the institution of the suit and have manifested no interest in it since then, except that they did sign the appeal bond, after judgment was rendered against them for cost in the court below.

This lease contract is also attacked and ridiculed on the ground that the board and superintendent of education exceeded their authority by fixing the rental for the fifteen-year term and by putting it completely into effect in all respects at the same time the seven-year period was put into effect instead of giving the lessee a simple preference to lease the land again after the expiration of the seven years. If we read section 4149, as amended by the Acts of 1898, alone, there is much merit in appellant's argument, because this statute is vague as to when the second lease was to be made or to take effect. It must be remembered however, that the board is given general authority over these lands and may do anything with them which is not expressly prohibited by law; and this statute does not limit them as to the time when the preference is to be exercised, or as to the time when the entire transaction, including both terms, shall be closed by them. It must be presumed however, that the board of supervisors when they executed this lease, and the legislature when it enacted this statute, had in mind and intended compliance with section 211 of the Mississippi Constitution which makes no mention of a mere preference to be given the lessee after the expiration of the preliminary term, but does provide that he shall have the right, thereafter to lease for a term or to hold on payment of ground rent. The argument that the amount of ground rent, should not be fixed until the beginning of the second period may contain ever so much merit, but it should be presented to the legislature and not to the court. If the lessee however, is to have his rents for the second period raised to any sum which may suit the fancy or even the prejudice of some board to be elected

in the distant future, I must say that the provisions for this second term would offer very little inducement for him to lease the land at all. Unless some definite preference or advantage can be assured to him in regard to the second period, I doubt whether any responsible man would take land of the same kind and location and improve it like it should be for a mere seven-year lease.

SAM C. COOK, P. J., delivered the opinion of the court.

Certain resident citizens and taxpayers of Quitman county exhibited their bill of complaint in the chancery court against Tom Richards, the original lessee of certain parts of a sixteenth section in said county, and his grantees and lessees of the north one-half of section 16, township 28, range 1 west. The bill alleged that the lease was void and prayed a cancellation of said lease and an accounting.

We will not attempt to trace the byways of this record, but will endeavor to settle the vital principles for the guidance of the trial court.

The original lease of the land in question discloses that the trustees of the township authorized a lease for a term of years and the board undertook to lease the sixteenth section for a term of seven years, conditioned upon the lessee making certain improvements on said land. At the same time the board also leased for a term of fifteen years, to begin at the expiration of the seven-year lease, providing that the lessee should have the land for a further term of fifteen years at an annual rental of three hundred twelve dollars and fifty cents. It will be observed that the board of supervisors thus contracted in effect to lease the sixteenth section land for a term of twenty-two years. After the expiration of the seven-year lease, made in consideration of certain improvements (which were not fully made), the board attempted to ratify the fifteen-year lease and made an order, without getting the consent of the heads of families, to make the lease extend for fifteen years from the expiration of the seven years, embracing a provision

in the new order for certain improvements not made during the seven-year lease.

The law bearing on the power to lease is embodied in an act of the legislature. We here copy the act, omitting the title:

"That section 4149 of the Annotated Code of 1892, be amended so as to read as follows: 4149. *Lands to be Leased.* None of such lands shall ever be sold, but they shall be leased; those not in a city, town or village, for a term not exceeding fifteen years and those in a city, town or village, for a term not exceeding twenty-five years, on condition of the payment annually of the rent reserved. But the board of supervisors in the case of uncleared lands may lease them for not exceeding seven years in consideration of the clearing and improvement thereof, and with condition that the lessee shall have the preference to lease the same for another term of fifteen years or less, at an annual rental to be agreed upon as in other cases of leasing." See chapter 40, Laws 1898.

In this case it clearly appears that the lessees did not perform their contract by clearing the land and building houses as agreed in the first lease. They did not make the improvements they contracted to make, and therefore they are not entitled to a preference in the leasehold.

The original lease does not conform to the statute; the statute merely gives a preference to the lessee, while the lease here fixes in advance the annual rental. The statute contemplates that the second lease shall be made after the improvements are made under first lease, or after its expiration if they are not made as agreed.

We think that an accounting should be had between the lessees and the board of supervisors. The lessees should be credited with the value of the improvements made in accordance with the contract and debited with the value of the improvements not made. In other words, the county is entitled to get the value of the consideration on which the seven-year lease was made. The judgment will be reversed, and the cause remanded.

*Reversed and remanded.*

*McBEE & GOSSETT v. CAHABA CONST. CO. et al.*

[87 South 481. No. 21889.]

1. **APPEAL AND ERROR.** *When stenographer's transcript of evidence will be stricken under statute stated.*

A stenographer's transcript of the evidence, filed pursuant to a notice so to do, given within the time prescribed by law, will not be stricken from the record for any reason, "unless it be shown that such notes are incorrect in some material particular, and then only in cases where such notes have never been signed by the trial judge, nor been agreed on by the parties, nor become a part of the record as provided by this act."

2. **APPEAL AND ERROR.** *Striking stenographer's transcript of evidence no ground for dismissal of appeal.*

An appeal will not be dismissed for the reason that the stenographer's transcript of the evidence has been stricken from the record.

APPEAL from circuit court of Washington county.

HON. S. F. DAVIS, Judge.

Proceeding between McBee & Gossett' and the Cahaba Construction Company and others. Judgment for the latter, and the former appeal. On motion to strike stenographer's transcript and to dismiss appeal. Overruled.

*Walton Shields*, for appellants.

*Percy & Percy*, for appellees.

SMITH, C. J., delivered the opinion of the court.

This case comes on to be heard on a motion by counsel for the appellee to strike the stenographer's transcript from the record and to dismiss the appeal for the reason that the transcript was not filed within the time allowed by law; it having in fact been filed more than one year

after the rendition of the judgment appealed from. The appeal bond was not filed until after the expiration of the time allowed by law for appeals to this court, but the rights of the appellee growing out of that fact are not involved on this motion; there being an agreement in the record by counsel covering that question.

We assume, as there is no contention to the contrary, that notice to transcribe his notes of the evidence was served on the stenographer within the time provided by law. Section 797d, Code of 1906 (section 585, Hemingway's Code), which is now a part of chapter 145, Laws 1920, provides that—

“If notice as above is given to stenographer by the appellant or his counsel within ten days after the conclusion of the terms of court, no stenographer's transcript of his notes shall be stricken from the record by the supreme court, *for any reason* (italics supplied) unless it be shown that such notes are incorrect in some material particular, and then only in cases where such notes have never been signed by the trial judge, nor been agreed on by the parties, nor become a part of the record as provided by this act.”

Under this statute, since no claim is here made that the transcript of the evidence is incorrect in any particular, the motion to strike it from the record must be overruled.

The motion to dismiss the appeal would have to be overruled, even though the motion to strike the transcript from the record should be sustained, for the absence of a transcript of the evidence does not bar an appeal on the record proper.

*Overruled.*

## SLATTERY v. P. L. RENOUDET LUMBER CO., LIMITED.

87 South. 488. No. 21724.

1. **ATTACHMENT.** *Garnishment Agent may attach property sold for commission, but cannot attach buyer's property for seller's debt; attachment fails where buyer was garnished after paying purchase money.*

Where an agent suing for commission depends on making a sale to give him a right to a commission, he may attach or seize the property sold for the commission. He is not entitled, in such case, to attach the property of the buyer for the debt of the seller. And where a sale is made and the purchase money paid before garnishment is served, and where no property of the defendant is attached, save that sold by the agent, the attachment fails.

2. **ATTACHMENT.** *Lien exists only when property seized; lien does not relate back to filing of bill.*

An attachment lien does not arise from the filing of a bill, but only exists when the property is seized. It does not relate back to the date of the filing of the bill, but dates from the seizure under the writ.

3. **ATTACHMENT.** *Where property belonging to third persons is seized, they may intervene to cancel *lis pendens* notice.*

Where an attachment is sued out in the chancery court and property is seized, which belongs to third persons, and *lis pendens* notice is filed describing property not belonging to the defendant, but belonging to such third persons, such person may intervene in the suit to protect this property and to cancel *lis pendens* notices affecting such property or beclouding the title of such persons.

APPEAL from chancery court of Adams county.

HON. R. W. CUTRER, Chancellor.

Action by Edward L. Slattery against the Southwestern Lumber & Box Company, with the P. L. Renoudet Lumber Company, Limited, as garnishee. From orders overruling certain motions, and a decree discharging the garnishee

and canceling a notice of *lis pendens*, plaintiff appeals. Affirmed.

See, also, 120 Miss. 621, 82 So. 332.

*A. H. Geisenberger and Martin & Byrnes*, for appellant.

It appears that this suit was filed, and attachments levied and *lis pendens* notices filed in both Adams and Wilkinson counties, before the deed from Southwestern Lumber & Box Company to Renoudet Company was recorded in either of said counties.

In this condition of affairs the question is whether the court lost jurisdiction to proceed further with the case when it appeared that, as to Adams county lands, the deed to Waddell-Williams Company, had been executed after filing of the suit, but before levy of the attachment, on Adams county lands, but that said levy had been made before the deed had been placed of record.

The statute governing the venue of suits in the chancery court is section 561, Code 1906, and we take it that an attachment suit in chancery is governed by that part of this section that reads as follows: "Other suits respecting real or personal property may be brought in the chancery court of the county in which the property, or some portion thereof, may be."

When this suit was brought there was nothing of record in either Adams or Wilkinson county to show any change of ownership from the Southwestern Lumber & Box Company, to any one else. When the attachment was levied in both counties the record was still barren of any conveyance from Southwestern Lumber Company to any one. Now, appellant was bringing his suit against Southwestern Lumber & Box Company by attachment against its real estate; that real estate consisted, to all appearances and actually of lands in both Adams and Wilkinson counties. Appellant could have filed his suit in either of these counties and been strictly within the terms of section 561, *supra*. He selected Adams county as the one in which to

file suit. Is it possible that because the sheriff of Adams county failed to promptly levy his attachment writ so that the Southwestern Lumber Company had executed its deeds to Renoudet Company before the levy, therefore all jurisdiction of the chancery court was lost. Is this possible when we consider that had the appellant by chance selected the Wilkinson county court as the forum, and the same facts had taken place as actually occurred, there could be no doubt that the court could go ahead with the case at least so far as the lands in Wilkinson county were concerned.

We submit that such is not the law; that the jurisdiction in such case is not such as may be ousted after suit filed by a mere chance, but is fixed by the condition existing at the time the suit is filed; that if, at that time, the court had jurisdiction, it would not lose it by reason of anything occurring thereafter; though it might lose the power to act against some special property by reason of said occurrence. Our argument here is that inasmuch as there were lands belonging to the Southwestern Company in both counties at time of suit the jurisdiction of either court would attach and could not be destroyed by anything occurring subsequent thereto, so long as any property remained subject to the attachment levy. In this case, granting there was no error in the court's order discharging the attachment as to Adams county lands, there yet remained subject to the lien of the attachment all the Wilkinson county lands, so that the jurisdiction of the court remained perfect. If, however, the case was that it appeared from the record that the lands in both Adams and Wilkinson counties had been sold and conveyed before the levy of attachments therein, a different result might follow and the decree of the court appealed from would have a better foundation.

Furthermore, we submit to the court that, under sections 2787 and 2788 of Code of 1906, these lands, both in Adams and Wilkinson counties, were held by the attachments levied upon them. Upon the levy of the attach-

ment the attaching creditor, Slattery, acquired a lien upon all the lands, and was protected by the above quoted sections. If so, so far as this suit is concerned, the sale and conveyance to Renoudet Lumber Company was as though it had never been made; the recordation of the deed came too late to affect the attaching creditor, who had levied in both counties before record of the deed in either. Appellant certainly could not have been held at the time he sued out his attachment suit and filed his bill, as having any notice of the deed to Renoudet Company, for the sufficient reason that the deed was not then executed. Could he be placed in a different position afterwards by reason of failure of the sheriff of Adams county to promptly levy the attachment writ in his hands? We say not. The truth is that while appellant feared, and had reason to fear, that Southwestern Lumber Company might, to defeat his claim for commission, convey all the lands either to Renoudet Lumber Company or to some other concern, and for that reason he attached, yet he had no notice of any actual, existing conveyance, either when he brought his suit or until after the deed was actually filed for record. The fact that there was a probability, or possibility, that such conveyance would be made did not put him on notice; we submit that an examination of the authorities on the point will show that the doctrine of notice applies only as to conveyances actually in existence, and not as to those that may later come into existence.

Upon the record we respectfully ask the court to reverse and remand so that its former decision in this case may be made operative and appellant may have an opportunity to establish his legal rights in the premises; and we also ask that, in remanding the court will so shape its decree as to prevent any further side blows from persons, or corporations, not parties, by indicating that such strangers to the record have no standing to enter their appearance herein, so the lower court may exclude them hereafter.

*Ratcliff & Kennedy*, for appellee.

The court will please observe that this case is an attempt by the appellant to collect his commission from the purchaser of the lands, the Renoudet Lumber Company, when his bill of complaint alleges that he was employed by the grantor, the Southwestern Lumber & Box Company and that it alone is indebted to him for the commission. The original bill of complaint sought no relief against the Renoudet Lumber Company except for it to answer whether or not it was indebted, and to give information as to the interest of said Box Company in said lands.

We submit to the court that a broker, representing the owner of lands, cannot negotiate a sale and thereafter collect his commissions at the expense of the grantee whom he induced to buy.

The fourth assignment of error is: "That the court erred in sustaining the motion of Waddell-Williams Lumber Company and rendering a decree thereon discharging the attachment and cancelling the notice of the *lis pendens* as to the lands in Wilkinson county levied on in this suit."

This assignment of error is the only one, in our opinion, that is pertinent to the issue involved in the lower court, and that is properly assignable against the decree appealed from. It is the only assignment by appellant that is a direct attack upon the decree complained of. The decree herein appealed from was rendered on the third day of August, 1920, and at the July term of the chancery court of Adams county, and at that particular time the *status* of the case was as follows:

"The bill of complaint was pending against the Southwestern Company, a non-resident, upon whom process had not been had except by publication. There was also pending an amendment to this original bill, making the Southwestern Lumber & Box Company and the P. L. Renoudet Lumber Company defendants thereto. Process had been issued to the sheriff of Adams county and returned that the principal defendant had not been found and under

diligent search and inquiry . . . Attachment had been issued to the sheriff of Adams county, and levied upon certain lands in Adams county, but at the January term theretofore, the writ had been quashed and the lands released from the levy and adjudicated to be lands of P. L. RenouDET Lumber Company. An alias writ of attachment had been issued to the sheriff of Wilkinson county and a return made thereon showing a levy upon the lands in Wilkinson county.

It is therefore apparent that the bill and amended bill was pending in the chancery court of Adams county, Mississippi, without personal process upon the principal defendant, without jurisdiction of a garnishee debtor, and without an attachment of any property within Adams county as the property of principal defendant, the attachment as to the Adams county lands having been released by an order of the court at a former term thereof, and without objection from this appellant, and we therefore submit that the chancery court of Adams county was without jurisdiction to enter a decree as to the lands in Wilkinson county, Mississippi, said lands being the only property then before the court by way of attachment. Upon this proposition the authorities are unanimous.

Under section 561 of the Code of 1906: "Other suits respecting real or personal property may be brought in the chancery court of the county in which the property or some portion thereof may be."

In the case of *Pollard v. Phalen*, 53 So. 453, it was held: "That a suit respecting personal property is not brought in the county where it is situated, as, by Code of 1906, section 561, it shows it is ground for a demurrer to the bill." The circuit court is without jurisdiction to render a judgment by default in attachment suit against a defendant who is served with process in another county."

In *Werner Sawmill Co. v. Sheffield*, 42 So. 876, it was held: "A court has no jurisdiction of an attachment against a non-resident where the complainant fails to show that the party upon whom the writ was served had

in its possession at the time any property subject to the attachment."

In *Yale v. McDaniel*, 12 So. 556, it was held: "Attachment can only be sued out in the county where the debtor resides or last resided, or where his property is found." Neither the defendant, any of his creditors, nor any of his property was found in Adams county, Mississippi, where the bill was pending, but the only property claimed to have been found and against which a judgment was asked, was that upon which a levy had been made in Wilkinson county under an *alias* writ of attachment.

The exact principle of law is very clearly stated in 6 Corpus Juris, page 96: "A writ cannot be sued out to attach property in a foreign county unless there is an attachment of property within the county where the suit is brought or personal service on defendant within the county to give the court jurisdiction."

This principle absolutely governs this case, and is borne out by the Mississippi decisions which we have cited. Not only is it perfectly apparent that this is the law, but a consideration of the reverse thereof will prove the soundness of the rule and the absurdity of the reverse. Could the chancery court of Adams county, Mississippi, entertain a suit by way of attachment against a non-resident where personal process was not had upon an *alias* writ of attachment to some other county in the state under which property was seized but without any property having been seized in Adams county? If the principle contended for by appellant's counsel is correct, then the chancery court of any county in the state of Mississippi has jurisdiction of a suit against a non-resident, provided property of the non-resident can be found at any place in the state of Mississippi.

We submit that jurisdiction is absolutely lacking when it depends solely upon the attachment of property under an *alias* writ. *Baum v. Burns*, 66 Miss. 124.

Again, at that particular time, all of the lands in Adams county which had been levied upon in this cause, had been,

at a previous term of the court, released from the attachment as the lands of Renoudet Lumber Company and not the lands of the principal defendant, and the court here therefore had not acquired jurisdiction by an attachment of lands of the principal defendant.

Upon this proposition of the jurisdiction of the court, we submit that the court, upon its own motion, had the right to discharge said attachment and release said *lis pendens* notice without appearance of either Renoudet Lumber Company, or the Waddell-Williams Company, for the court had no jurisdiction to enter a decree with respect to the sale of lands in Wilkinson county and therefore, if appellant is correct, that neither of said companies had the right to be heard, the decree should still be affirmed, because the court had the right, and it was its duty to dismiss the cause for want of jurisdiction.

Upon the merits of this cause, we desire to submit to the court that the *lis pendens* against these lands should have been cancelled upon the record now before the court, regardless of the question of jurisdiction. The claim of the appellant to his commission is based upon his assertion that he was the procuring cause of the Renoudet Lumber Company buying the lands in question from his principal, the Southwestern Lumber & Box Company, his principal, owed him the commission. There is no allegation that the Renoudet Lumber Company owed the commission, or any part thereof, nor did anything whatsoever to prevent the Southwestern Lumber & Box Company, paying said commission under this state of facts disclosed by the complainant's pleadings and the evidence now offered to the effect that the Renoudet Lumber Company really did purchase the lands and receive a deed therefor, and paid the purchase price therefor, is it not perfectly apparent that the complainant is estopped to assert any prior claim of lien as against the said lands which he induced this defendant to buy? If the complainant, Slattery, had a claim against said lands, it was his duty to make known

to the Renoudet Lumber Company whom he induced to buy said lands, that he had such claim.

We submit to the court that if the complainant's claim had been in the form of a record mortgage, filed before the deed to Renoudet Lumber Company was made, he would be estopped under the state of facts in this case to assert it as a prior lien upon the lands. The claim of this appellant is by way of attachment against the very thing he induced this defendant to buy, and without any notice whatever to this defendant that he did have, or would make such claim. We submit to the court briefly that it is not reasonable that a real estate broker should induce one to buy a tract of land and then attach the particular land as the land of the grantor before the deed was placed of record, and thereby had a priority, and in effect, make the purchaser, whom he induced to buy—pay his commission. The purpose of recording a deed or a mortgage is to give notice to third parties; it is not of any benefit whatever to the parties to the deed or mortgage; at most, the recording is only constructive notice, and can, under no circumstance be given more effect than actual notice. Actual notice to any third party as to the sale of lands is just as binding and effective upon him as the actual recording of the deed, which would be only constructive notice to him.

Appellant grounds his claim in this case upon the fact that his attachment was sued out before the deed was recorded; but admits in the bill of complaint that he knew of the sale of lands, and, in fact, was the procuring cause of the sale of the lands, to the Renoudet Lumber Company for a valuable consideration. We then ask, Can the appellant prevail in his attachment suit where he had actual notice if he could not have prevailed with constructive notice? However, the mere attachment nor the return of the officer creates any attachment lien as against third persons but it is the record of the levying attachment in the *lis pendens* record, and it is not shown in this record

that any such record was ever made, but if so, it is not shown when it was made.

And, in conclusion, we submit to the court that the chancellor was correct in holding that he had no jurisdiction to further proceed in said cause, and for that reason the *lis pendens* should be cancelled, but, in addition thereto, the decree was proper because this complainant is estopped to make any prior claim to a satisfaction of his debt out of the lands in the hands of this defendant, whom he induced to buy, and of which purchase he had actual notice before filing the bill of complaint.

ETHRIDGE, J., delivered the opinion of the court.

The appellant, acting as a real estate agent, and representing the Southwestern Lumber & Box Company, undertook to sell, and did sell, to the appellee the Renoudet Lumber Company, Limited, certain timber lands situated in Adams and Wilkinson counties, and after the sale was made, and before the deed was returned to Natchez for recordation, this attachment was sued out against the Southwestern Lumber & Box Company, in the chancery court, and the appellee Renoudet Lumber Company was made a party and served as a defendant and as garnishee. But before the service of the process on defendant the Renoudet Lumber Company, the deed was returned and placed to record. The appellee Renoudet Lumber Company filed an answer denying that it was indebted to the Southwestern Lumber & Box Company, or that it had property belonging to the said company, or that it knew of others having such property, and also denied that the Southwestern Lumber & Box Company owned any of the land described in the bill, or any interest therein. The Southwestern Lumber & Box Company did not appear, and was served only by publication; it being a nonresident of the state of Mississippi.

The court, on the hearing on motion, discharged the garnishee, the Renoudet Lumber Company, and entered

an order canceling the *lis pendens* notice filed in the two counties; from which order canceling the *lis pendens* notice of formal appeal was prosecuted to this court, and the judgment canceling the *lis pendens* notice was reversed until the issue between the appellant and the Southwestern Lumber & Box Company should be determined in the court below. The former appeal is reported in 120 Miss. 621 et seq., 82 So. 332.

Subsequent to the attachment being served, the Renoudet Lumber Company sold the timber and timber lands involved, to the Waddell-Williams Lumber Company, a Louisiana corporation, and after the cause was remanded to the court below, this company filed a petition to be permitted to intervene to protect its rights and to have the *lis pendens* notice canceled as against its lands in Wilkinson county; and the appellee, the Renoudet Lumber Company moved to cancel the *lis pendens* notice as to the lands in Adams county.

The attachment was levied on the lands in Wilkinson county on September 11th and *lis pendens* notice sent with the process, but no defendant was served in Wilkinson county, and no property therein attached except that involved in the sale on which the claim of the complainant is founded.

There was no proof taken by the complainant to show ownership of the timber or any interest therein in the Southwestern Lumber & Box Company, other than the attachment proceedings and the deed from the Southwestern Lumber & Box Company to the Renoudet Lumber Company, and no other property was attached.

The following assignments of error are filed:

(1) The court erred in rendering the decree of February 9, 1920, discharging the attachment and canceling notice of *lis pendens* as to lands in Adams county.

(2) The court erred in overruling the motion of the appellant that the Waddell-Williams Lumber Company should not be heard until the appeal cost, taxed to the Renoudet Lumber Company by this court, but paid by the

appellant, has been paid by the said Waddell-Williams Lumber Company or the Renoudet Lumber Company.

(3) The court erred in overruling the motion of appellant that neither the Waddell-Williams Lumber Company nor the Renoudet Lumber Company could be heard in the cause.

(4) The court erred in sustaining the motion of the Waddell-Williams Company in rendering a decree therein discharging the attachment and cancelling the notice of *lis pendens* as to lands in Wilkinson county, levied on in this suit.

The decree of February 9, 1920, discharging the attachment and canceling the notice of *lis pendens* as to the Adams county lands, we think, was proper because it clearly appears that the appellant's suit is based on a commission claimed from the Southwestern Lumber & Box Company for the sale of the lands in controversy to the Renoudet Lumber Company, and that the purchase money was paid for these lands prior to the service of the attachment and garnishment. The appellant does not contest, or did not contest, the answer to the garnishee, the Renoudet Lumber Company, that it had paid the purchase money and owed the Southwestern Lumber & Box Company nothing at the time of the service of the writ. The suit could not be sustained unless the said company owed the Southwestern Lumber & Box Company some money, or unless the said lumber company owned some property, other than that attached by the complainant, in the state in which it was attached. The appellant cannot contend that the company owned an interest in the property because the foundation of his claim to a commission depends upon a sale of property, and there is no pretense that the property attached is not the property sold by the Southwestern Lumber & Box Company to the Renoudet Lumber Company.

It further appears that the deed from the Southwestern Lumber & Box Company to the appellee, Renoudet Lumber Company, was executed and delivered prior to the service of the attachment and the filing of the *lis pendens*

in Adams county. No lien could be established until the writ was served. It is the seizure of property under attachment proceedings that creates the lien on the property; inasmuch as no property except that sold by complainant was attached, the attachment fails.

The contention that the appellees Waddell-Williams Lumber Company, who bought from the Renoudet Lumber Company subsequent to the attachment, should not be allowed to intervene, and that the Renoudet Lumber Company should not be allowed to reappear in court and make motion to cancel the *lis pendens* notice after it had been discharged by the former judgment as garnishee, is also unsound in our opinion. The *lis pendens* notice would appear to create a cloud on the title of these appellees. It might seriously affect their ability to sell or finance said property so long as the attachment proceedings stood against them. It is true it could file a separate bill to have these notices canceled, but we think it could also intervene and prevent the establishment of a cloud by a judgment of the court. Whenever a party has a claim to property in litigation, which might be adversely affected by the litigation, though he is not a party to the litigation, he may become a party on motion for the purpose of protecting his own property from being jeopardized or his title from being beclouded.

There is no merit in the contention of the appellant that the appellee should have been required to pay the costs incurred on the former appeal before coming into court to protect their rights. The judgment can be enforced on execution. But if it cannot be collected on execution, there is no such connection between the duty to pay the judgment and the right sought to be enforced here as would prevent a party coming into equity for the purpose of preventing an injustice being done him or his property by affecting the title to his property.

On the facts in the present record, we think the chancellor was justified in rendering the decree as rendered, and the judgment will be affirmed.

*Affirmed.*

## YAZOO &amp; M. V. R. Co. v. MULLINS.

[87 South. 490. No. 21462.]

## 1. SUFFICIENCY OF EVIDENCE.

In a suit for death by negligence of railroad, *held*, that evidence was sufficient to support verdict by reasonable inferences drawn from facts and circumstances.

2. NEGLIGENCE. *Instruction on diminishment of damages for contributory negligence held erroneous.*

An instruction on diminishment for contributory negligence which told the jury to award such damages as bears the same proportion to the damages which would have been recoverable had not deceased been guilty of negligence that the negligence of deceased bears to the combined negligence of deceased and defendant is erroneous.

APPEAL from circuit court of Adams county.

HON. R. L. CORBAN, Judge.

Action by Mrs. Clara J. Mullins against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed as to liability, and reversed as to damages only.

*Chas. N. Burch, H. D. Minor, and Ratcliff & Kennedy*, for appellant.

The court erred in instructing the jury as to contributory negligence. We feel so clear after a careful reading of the record in this case that a directed verdict should have been given that we hesitate to further prolong this brief. Independent, however, of what we have said above there is a clear error in the instruction to the jury relative to contributory negligence. At the request of the plaintiff the court charged the jury as follows:

"The court instructs the jury for the plaintiff: That even though the jury may believe that the plaintiff was

guilty of negligence which proximately contributed to the injuries sustained by him, that this fact would not prevent the plaintiff from recovering in this case, providing the jury further believe from a preponderance of the evidence in this case that defendant was guilty of such negligence as proximately contributed to and was one of the proximate causes of the injuries sustained by Mullins. But that should the jury believe that Mullins and the defendant were both guilty of such negligence as proximately contributed to and caused the injuries sustained by Mullins, that the jury should in that event, not award to the plaintiff the full amount of damages otherwise recoverable in this suit, but should award her an amount which bears the same proportion to the damages which would have been recoverable in this suit had not Mullins been guilty of negligence, that the negligence of Mullins bears to the combined negligence of Mullins and the defendant.

Under this instruction, if the jury had found that both the plaintiff and defendant were guilty of negligence and that two-thirds of the combined negligence was attributable to Mullins and one-third to the Railroad Company, and if the jury had further concluded that the plaintiff's total damages were fifteen thousand dollars then the jury would award two-thirds of fifteen thousand dollars or ten thousand dollars as the damages which the plaintiff could recover. In other words, under this instruction the greater contributory negligence of Mullins the greater amount he would recover, and the less the contributory negligence of Mullins the less amount he would recover.

As said by the supreme court in *Norfolk & Western R. Co. v. Earnest*, 229 U. S. 114: "The statutory direction that the diminution shall be in proportion to the amount of negligence attributable to such employee means, and can only mean that, where the casual negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the en-

tire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee."

In *Seaboard Air Line R. Co. v. Tilghman*, 237 So. 499, the jury were instructed that they should determine the full amount of damages sustained by the plaintiff and deduct from that whatever amount you think would be proper for the contributory negligence. The supreme court held this instruction erroneous, for reason that it committed to the jury the diminution of damages without stating the standard of diminution prescribed by the Federal Employer's Liability Act, the only standard according to the instruction being whatever the jury's own conception of reasonableness might be. In the last mentioned case the court said:

"It means, and can only mean, as this court has held, that, where the casual negligence is attributable partly to the carrier and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportionate part of the damages corresponding to the employee's contribution to the total negligence, *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 111, 122, 57 L. Ed. 1096, 1101, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C. 172; *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 49, 58 L. Ed. 838, 842, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168.

At the trial the court instructed the jury that, if they found the plaintiff was injured through the concurring negligence of the railway company and himself, they should determine the full amount of damages sustained by him, and then deduct from that whatever amount you think would be proper for his contributory negligence. This

was reiterated in different ways and somewhat elaborated, but the fair meaning of all that was said was that a reasonable allowance or deduction should be made for the plaintiff's negligence, and that it rested with the jury to determine what was reasonable. No reference was made to the rule of proportion specified in the statute, or to the occasion for contrasting the negligence of the employee with the total casual negligence as a means of ascertaining what portion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform, other than their own conception of what was reasonable. In this there was a failure to give proper effect to the part of the statute before quoted. It prescribed a rule for determining the amount of the deduction required to be made, and the jury should have been advised of that rule and its controlling force.

It results that the objection to the instruction upon this subject was well taken and should have been sustained. *Seaboard Air Line R. Co. v. Tilghman*, 237 U. S. 499; Roberts Federal Liabilities of Carriers, sec. 584.

The vice of the instruction as given by the court in the instant case is that it allows the plaintiff to recover in the proportion plaintiff's negligence bears to the combined negligence, whereas the instruction should have been to diminish the recovery in the proportion that the plaintiff's negligence bears to the combined negligence.

The matter has been very accurately stated by the supreme court of Pennsylvania in *Waina v. Pennsylvania Co.*, 251 Pa. 213, 96 Atl. 461, as follows: "If the issue of the defendant's negligence is determined in favor of the plaintiff, then the jury should consider whether or not he, too, was guilty of negligence directly contributing to the happening of the accident, and, if they decide that issue against the plaintiff, then, looking at the combined negligence of the plaintiff and defendant as a whole, and using their best judgment based on the evidence before them.

the next material subject for the jury to consider is in what ratio should this combined negligence be distributed between the parties to the accident; in other words, how much, or what proportion, of the whole blame, or fault, should be attributed to each. After this problem is solved, the jury must determine the amount of the damages suffered through the combined negligence, and deduct therefrom a proportion corresponding with the measure of negligence charged against the defendant to be awarded as damages to the plaintiff."

The Federal Employer's Liability Act provides that in case of contributory negligence, the damages should be diminished by the jury in proportion to the amount of negligence attributable to such employee.

In the instruction as given by the court in the instant case the jury is told not that the damages should be diminished in proportion to the amount of negligence attributable to the employee, but that damages are to be recovered in proportion to the amount of negligence attributable to the employee.

This error is so plain and patent that in the absence of all else the case must be reversed.

*M. W. Reiley*, for appellee.

As to instruction touching diminution of damages. The instruction given was clearly erroneous. It was never intended by counsel for appellee that such an instruction should be given to the jury and I had no knowledge of it having been given until I received the brief of opposing counsel. However it is in the record.

But is the appellant in a position to complain? No plea on contributory negligence was filed. Under section 744 of the Code of the state of Mississippi this plea must have been filed to enable the appellant to get any benefit from the contributory negligence of Mullins. Therefore, since no plea of contributory negligence was filed, the appellant was not entitled to have the jury told that the negligence,

if any, of Mullins would warrant a diminution of damages.

This being true, the appellant had the benefit of an instruction that was more favorable to it than its position justified it in receiving. If this is true under a long line of Mississippi decisions appellant cannot now complain. See the case of — v. —, 36 S. C. 185, wherein the same rule is announced by the supreme court of the United States in a case under the act now in hand.

The question of the necessity of filing of special plea or notice under the general issue of contributory negligence was a matter of practice and procedure and the procedure of this state will be followed. See *K. C. Ry. Co. v. Jones*, 60 L. Ed. 943.

Under this Mississippi Statute (Law 1910, chap. 135) touching contributory negligence and the decisions construing that act, a defendant is required to plead the alleged contributory negligence and then ask for proper instructions informing the jury of the contributory negligence of the plaintiff. See *Lindsay Wagon Co. v. Nix*, 108 Miss. 814, 67 So. 459. In the case at bar the appellant sat idly by he failed to ask any instruction on the point under consideration and now when the jury had returned a verdict and the case is here for review, appellant complains that the court fell into error but that appellant failed to call the attention of the court to that fact by asking for and obtaining a proper instruction. I submit that even though the court may think that the case should be reversed for proper assessment of damages that certainly under no view of the case should the finding of the jury as to liability be disturbed.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from the circuit court of Adams county, wherein the plaintiff, Mrs. Clara J. Mullins, administratrix of the estate of James Davis Mullins, deceased, recovered a judgment of ten thousand dollars against the

appellant railroad company on account of fatal injuries sustained by said James Davis Mullins on October 14, 1915, while employed as a flagman by said railroad company and while boarding or mounting a train at Harrison, Miss.

This is the second appeal in the cause. The opinion of this court on the first appeal is reported in *Y. & M. V. R. Co. v. Mullins*, 115 Miss. 343, 76 So. 147. From a judgment of affirmance on the first appeal the case was taken to the supreme court of the United States on a writ of error, and by it reversed on the grounds that our *prima facie* negligence statute (section 1985, Code of 1906; section 1645. Hemingway's Code) does not apply in cases under the Federal Employers' Liability Act (U. S. Comp. St., sections 8657-8665), and that an instruction to the jury on the duty of the master to furnish a safe place to work was erroneously granted. See *Y. & M. V. R. Co. v. Mullins*, 249 U. S. 531, 39 Sup. Ct. 368, 63 L. Ed. 754. Upon the mandate of the United States supreme court this court set aside its former judgment and reversed and remanded the case for a new trial in the lower court in accordance with the opinion of the federal supreme court. See *Y. & M. V. R. Co. v. Mullins*, 120 Miss. 662, 83 So. 1.

When the case was again tried in the lower court, the plaintiff introduced some new proof with reference to the proximate cause of the injury, in addition to the evidence introduced at the former trial. There was a verdict in favor of the plaintiff for ten thousand dollars, from which this appeal is prosecuted.

Appellant assigns several grounds for reversal, but we find no merit for discussion in any of them, except two, namely: It is contended that the evidence was insufficient to support the verdict of the jury, in that it failed to show that the negligence of the railroad company was the proximate cause of the injury; and, second, that the court erred in granting plaintiff the following instruction:

"The court instructs the jury for the plaintiff that, even though the jury may believe that the plaintiff was guilty of negligence which proximately contributed to the injuries sustained by him, this fact would not prevent the plaintiff from recovering in this case, providing the jury further believes from a perponderance of the evidence in this case that the defendant was guilty of such negligence as proximately contributed to and was one of the proximate causes of the injuries sustained by Mullins, but that, should the jury believe that Mullins and the defendant were both guilty of such negligence as proximately contributed to and caused the injuries sustained by Mullins, the jury should, in the event, not award to the plaintiff the full amount of damages otherwise recoverable in this suit, but should award her an amount which bears the same proportion to the damages which would have been recoverable in this suit had not Mullins been guilty of negligence that the negligence of Mullins bears to the combined negligence of Mullins and the defendant."

After an extended and careful consideration of the first point presented by appellant, we have reached the conclusion, by a divided court, that the evidence in the case was sufficient to sustain the verdict of the jury. Without discussing the testimony of the case in detail, we deem it ample to say that from all the facts and circumstances in proof, and by reasonable inferences drawn therefrom, the jury was justified in finding that the injury resulted proximately from the negligence of the railroad company. Therefore the judgment as to liability of the appellant is affirmed, Justices W. H. COOK, ETHRIDGE, and HOLDEN being of this opinion, and Justices SMITH, SAM C. COOK, and SYKES being of the opinion that the appellant is not liable, as to proximate cause, under the evidence in the case. On all other questions presented by the appeal the court is unanimous.

The granting of the instruction to the plaintiff on the question of diminishment of damages on account of contributory negligence of the deceased was obvious error, for

which we must reverse and remand the case for the assessment of damages only. This procedure is permissible under the case of *Norfolk Southern R. R. Co. v. Ferebee*, 238 U. S. 269, 35 Sup. Ct. 781, 59 L. Ed. 1303.

Affirmed as to liability, and reversed as to damages only.

*Affirmed.*

*Reversed.*

SMITH, C. J., and SAM C. COOK and SYKES, JJ., concur.

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WEAVER v. TURNER.

[87 South. 641. No. 21536.]

1. **COURTS.** *Act fixing term of chancery court held not repealed.*

The provision of chapter 262, Laws 1916, that the chancery court of George county shall convene on the fourth Monday of January and continue in session six days, was not repealed by chapter 257, Laws 1916.

2. **APPEAL AND ERROR.** *Objection to revivor in administrator's name cannot be made for first time on appeal.*

Since a suit to cancel a cloud on title may, under some circumstances, be revived on the death of the complainant in the name of his administrator (*Criscoe v. Adams*, 85 So. 119), an objection to such a revivor cannot be made for the first time in the supreme court on appeal.

3. **TRUSTS.** *Agreement by complainant on foreclosure to apply certain proceeds to personal judgment held to create a trust.*

An agreement by the complainant in a suit to foreclose a mortgage, and who has bid in the land covered thereby at the sale thereof under the foreclosure decree, that if an objection to the confirmation of the sale made by the defendant who owns the land be withdrawn he will sell the land and apply the proceeds in excess of the amount to be paid by him therefor and credited on the amount found to be due him by the defendant to the payment of a personal judgment rendered against the defend-

ant in the foreclosure decree, makes him, on the withdrawal of the objection and confirmation of the sale, a trustee of the land for the purpose stipulated in the agreement, and until he complies therewith a court of equity will not permit him to cause the personal judgment rendered against the defendant to be satisfied by the sale of other property of the defendant.

APPEAL from chancery court of George county.

HON. W. M. DENNY, JR., Chancellor.

Suit by Wiley W. Evans against I. H. Weaver, to set aside a sheriff's deed. On complainant's death, the suit was revived in the name of Arthur Turner, administrator. Decree for complainant, and respondent appeals. Affirmed.

*Sullivan & Sullivan and O. F. Moss*, for appellant.

*J. W. Backstrom and Oscar Backstrom*, for appellees.

No brief found in the record for counsel of either side.

SMITH, C. J., delivered the opinion of the court.

Wiley W. Evans exhibited an original bill in the court below against the appellant, praying that a deed to the land in controversy, executed by the sheriff of the county of George to the appellant pursuant to a sale of the land made by the sheriff under an execution, be set aside as a cloud on Evans' title thereto. While the cause was pending in the court below Evans died, and the suit was revived in the name of Arthur Turner, his administrator, without objection thereto by the appellant. The cause was tried on bill, answer, the exhibits to each, and oral evidence which oral evidence was not preserved, and consequently does not appear in the record, and the brief prayed for in the bill of complainant was granted.

The appellant's contentions are: First, that the decree of the court below is void for the reason that the decree was rendered at a time not provided by law for holding a

term of the chancery court of George county; second, that the cause should have been revived in the name of Evans' heir, and not of his administrator; third, that the pleadings and exhibits thereto do not present a case for the relief prayed for.

It appears from the bill, answer, and exhibits thereto that in 1915 a decree was rendered in the court below in a proceeding instituted by the appellant herein to foreclose a deed of trust upon certain land, but not that here in controversy, executed to him by Lillian Croom and her husband, J. J. Croom, to secure an indebtedness due him by them, directing that the land be sold by a commissioner appointed for that purpose, and the proceeds applied to the payment of the debt secured by the deed of trust. A sale of the land under this decree was set aside, and at a resale thereof the land was bid in by the appellant for the sum of one thousand dollars. A protest against the confirmation of this sale, accompanied by a bond conditioned in accordance with the statute, was filed by the Crooms, whereupon the appellant entered into a written agreement with them, stipulating that he would raise his bid for the land to five thousand dollars, that the sale should then be confirmed and a personal judgment rendered for the appellant against the Crooms for the balance that would then be due him by the Crooms, amounting to two thousand one hundred sixty-seven dollars and seventy-six cents, and that—

“therefore, in consideration of the premises aforesaid, it is further agreed by and between the parties hereto that the said I. H. Weaver shall sell said property as soon as he deems it advisable to do so, and that all moneys the said I. H. Weaver received for said property in excess of five thousand dollars shall be applied towards the satisfaction of the judgment aforesaid, and that if the said I. H. Weaver should receive for said property a sum of money in excess of the said five thousand dollars and more than sufficient to satisfy said judgment and costs in said cause,

then the balance shall be paid to the said J. J. Croom and Lillian Croom, or either of them."

Pursuant to this agreement the protest against the confirmation of the sale was withdrawn, and a decree was entered in accordance with its terms, except that the agreement of the appellant to sell the land and apply its proceeds to the payment of the personal judgment against the Crooms was not embraced therein.

In August, 1916, the land here in controversy, which was then owned by the Crooms, was conveyed by them to Evans, and on the 9th day of March, 1918, they also assigned to him their interest in the contract under which the consent decree was entered in the foreclosure proceedings, and by which the appellant agreed to sell the land purchased by him at the foreclosure sale and to apply the proceeds in excess of five thousand dollars to the satisfaction of the personal judgment therein rendered in his favor against the Crooms, and to pay to the Crooms any balance that might then remain.

The judgment in favor of the appellant against the Crooms was enrolled in the office of the circuit clerk of George county, and on the 2d day of May, 1918, an execution was issued thereon, under which the land here in controversy was sold by the sheriff to the appellant.

The appellant has made no effort to sell the land purchased by him at the foreclosure sale pursuant to his agreement with the Crooms so to do, but, on the contrary, declined to accept an offer of eight thousand dollars made to him by Evans therefor, and has stated to other prospective purchasers that it "would not be sold at any price, for the reason that he does not now deem it advisable" so to do.

The court below convened for the term at which the decree appealed from was rendered on the fourth Monday of January, A. D. 1920, as provided by chapter 262, Laws 1916, and the contention of the appellant that the decree is void is based on the assumption that the provision of chapter 262, Laws 1916, for the convening of the chan-

cery court of George county on the fourth Monday of January was repealed by chapter 257, Laws 1916. Chapter 104, Laws 1910, assigns the counties to the various chancery court districts, and provides for the holding of two terms of the chancery court annually in each of the counties. One of its provisions is that:

"A court to be styled 'The Chancery Court of the County of ———', shall be held in each county twice in each year, and as much oftener as is provided for by law and shall commence at the time and continue for the number of days specified, if business shall require, viz."

The county of George was created after the adoption of chapter 104, Laws 1910, by chapter 248, Laws 1910, assigned to the eighth chancery court district, and chapter 108, Laws 1910, provides that the chancery court of the county of George "shall convene on the fourth Monday of July, for six days, and the second Monday of December for six days." Chapter 108 was amended by chapter 262, Laws 1916, approved February 12, 1916, so as to provide:

"That the chancery court of the county of George shall convene on the fourth Monday of January, for six days, and the fourth Monday of July for six days."

Chapter 257, Laws 1916, approved March 11, 1916, amends chapter 104, Laws 1910, in several particulars, but leaves intact the provision thereof hereinbefore set out, one of the amendments being the assignment of George county to the eighth chancery court district, and providing that the chancery court shall convene "in the county of George, on the fourth Monday of July and second Monday of December, six days," the dates fixed by chapter 108, Laws 1910, the amendment to which by chapter 262, Laws 1916, approved a few days before, being seemingly overlooked. The effect of the adoption of chapter 257, Laws 1916, was to cause chapter 104, Laws 1910, in so far as it deals with the county of George, to read as follows:

"A court to be styled 'The Chancery Court of the County of ———', shall be held in each county twice in each year, and as much oftener as is provided for by law and

shall commence at the time and continue for the number of days specified, if business shall require. . . . In the county of George, on the fourth Monday of July and second Monday of December, six days."

This provision of the statute may be rewritten without changing its meaning so as to read as follows:

"A court to be styled 'The Chancery Court of the County of George' shall be held in the county of George, on the fourth Monday of July and the second Monday of December, and at such other time as is provided by law and continue in session for six days, if business shall require."

The provision then is not for the convening of the chancery court of George county on the fourth Monday of July and the second Monday of December only, but for the convening of that court on those days, and at such other times as is provided by law. Consequently, it does not conflict with the provision of chapter 262, Laws 1916, for the convening of the court on the fourth Monday of January, that being one of the other times provided by law referred to in chapter 257 when read in connection with chapter 104, Laws 1910, which it amends. It follows, therefore, that the effect of these statutes is to provide three terms of the chancery court for George county, and that the decree appealed from was rendered at a regular term of court.

No objection was made in the court below to the cause being revived in the name of the complainant's administrator, instead of in the name of his heir, and since it would be proper under some circumstances to revive such a suit in the name of the administrator (*Criscoe v. Adams*, 85 So. 119), the objection cannot be made in this court for the first time.

The effect of the contract entered into by the appellant and the Crooms hereinbefore set out is that the appellant holds the land in trust for the purpose of selling it and applying the proceeds in excess of five thousand dollars to the satisfaction of his judgment against the Crooms, and until he had discharged this duty, or shown a valid reason for not so doing, it would be inequitable to permit him to

cause the judgment to be satisfied by the sale of other property owned by the Crooms, or which they have disposed of since the rendition of the judgment.

*Affirmed.*

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NELSON v. BISHOP.

[87 South. 643. No. 21719.]

**PAYMENT.** *Mortgagor suing for over-payment cannot recover interest on notes actually due.*

On a bill by a mortgagor to recover an amount paid in excess of the amount actually due, he was not entitled to recover interest owing on the notes actually due to the date of the payment.

APPEAL from chancery court of Harrison county.

HON. W. M. DENNY, JR., Chancellor.

Suit by Henry Bishop against Henry Nelson. Decree for plaintiff, and defendant appeals. Affirmed conditionally.

*McDonald & Marshall*, for appellant.

This bill (page 1) alleges that the notes were dated March 24, 1917, that they bore six per cent interest per annum, that they provided for an attorney's fee if placed in the hands of an attorney. The deed of trust, page 6 of record, shows the same thing. So, even if there were only six notes due Nelson, amounting to three hundred dollars principal, he was entitled to interest at six per cent per annum from March 24, 1917 to May 23, 1918, on which latter date the money was paid to the trustee.

Yet the complainant below, appellee here, sued to recover back the interest paid on the six notes which he ad-

mits he owed Nelson, actually got a decree for it, and to cap the climax was allowed interest on that interest, which he had not asked in his bill, for March 17, 1918, which was more than two months before it had been paid to the trustee, to date of decree, May 28, 1920.

The allegation of the bill, that Nelson directed Hayden trustee, on March 18, 1918, and before all notes were due to foreclosure is contradicted by the deed of trust. The first note matured May 24, 1917, and one note on the 24th of each successive month, hence the tenth and last note matured February 24, 1918, and the trust deed authorized the owner to direct the trustee to foreclose when as many as three notes were in default.

These notes were turned over to attorneys, and an attorney's fee accrued. They were not paid until May 23, 1918, and attorney's fee was properly collected on each. So exhibits to the bill will control when in conflict with the bill, we find that the appellee, Bishop, owed the appellant, Nelson, even eliminating the two notes claimed to have been paid, as follows:

Six notes of \$50 each, amounting to .....	\$300.00
Six per cent. interest thereon from March	
24, 1917 to May 23, 1918 .....	23.00
	<hr/>
	\$323.00
Fifteen per cent. attorney's fee thereon ...	48.45
Cost of advertising .....	23.00
	<hr/>
Or a total of .....	394.45

Yet this twenty-three dollars interest, forty-eight dollars and forty-five cents attorney's fee, and twenty-three dollar costs the property of Nelson, is by this decree abstracted from his pocket and placed in Bishop's.

The appellee, Bishop, from his contention and from the bill and exhibits, could only have prayed for the return of the money paid by him to the trustee, as follows:

Brief for Appellee.	[125 Miss.]
Two notes of \$50 each .....	\$100.00
Six percent. interest on same from March 24, 1917, to May 23, 1918 .....	7.00
	<hr/> \$107.00
Fifteen per cent. attorney's fee .....	16.05
	<hr/>
Total .....	123.05

However, the bill does not so pray, but asks for two hundred fourteen dollars and twenty-four cents flat, and there is no prayer for general relief.

The allegation that appellee was ready, able and willing to pay the six notes is denied by the answer, and contradicted by the evidence, but in any event there is no allegation or proof of a tender or offer or attempt to pay anything until May 23, 1918.

I respectfully submit that the final decree entered on the minutes below should be reversed on the evidence, and bill dismissed.

*White & Ford*, for appellee.

There may be a technical oversight in the decree in including interest on the three hundred dollars of notes from March 24, 1917, to May 23, 1918, or twenty-three dollars. Bishop was ready to pay this at all times but for the fact that Nelson demanded the amount of five hundred fourteen dollars so if the court sees fit a remittitur of twenty-three dollars can be entered. Clearly the attorney's fees and costs of sale Nelson made Bishop pay to protect his property from a wrongful sale were correctly ordered to be paid back. The evidence showed and the chancellor found that Bishop was at all times ready to pay the proper amount and turning over to attorneys paid notes and demanding payment along with proper notes, refusing to accept the proper amount does not entitle the party so demanding to attorney's fees. Appellant says that Bishop

did not tender it. We showed Nelson would not accept and so showed we had to pay the wrongful demand along with a rightful one and refusal to accept the improper amount is also paid.

The chancellor found the three hundred dollars of notes and interest was tendered and would have been properly paid but for the improper demand of the other two notes. Certainly an advertising bill Bishop had to pay to protect his property from a wrongful sale is properly ordered paid back also. Counsel say the bill only demands two hundred fourteen dollars and twenty-four cents. It demands three hundred fourteen dollars and twenty-four cents in a lump sum and also asks that the fund in the hands of the garnishee be applied to the satisfaction of the claim of Bishop or that Bishop be returned out of said fund the amount wrongfully exacted of him.

We respectfully submit the decree should be affirmed. In accordance with the chancellor's findings from all the evidence it should be, but if the court is doubtful about the twenty-three dollar remittitur, we have no objection to its being entered.

W. H. Cook, J., delivered the opinion of the court.

This controversy grows out of an attempt to foreclose a deed of trust held by appellant upon appellee's one-half interest in a certain schooner. Appellee was indebted to one Spottswood, as evidenced by certain promissory notes dated March 24, 1917, and appellant acquired this indebtedness and deed of trust. Afterwards he directed the trustee in the deed of trust to advertise for sale the interest of appellee in the boat for the purpose of satisfying a balance of four hundred dollars and interest, which appellant claimed to be due on this indebtedness. Appellee claimed to have paid one hundred dollars on the indebtedness for which he had not received credit, and offered to pay three hundred dollars, which he admitted to be due. After the property was advertised for sale, in order to save it from

sale, appellee paid to the trustee, under protest, the full amount claimed by the trustee, together with interest and attorney's fees as provided in the notes, and the cost of advertising, amounting in the aggregate to five hundred fourteen dollars and twenty-four cents. Thereupon he filed his bill of complaint seeking to recover the amount which he had paid in excess of the three hundred dollars and interest accrued thereon, and from a decree in his favor for two hundred fourteen dollars and twenty-four cents, the full amount paid in excess of three hundred dollars this appeal was prosecuted.

The chancellor passed upon the disputed facts in the record, and we do not feel warranted in disturbing his finding that complainant is entitled to recover the amount paid in excess of the sum admitted to be due. There is, however, a manifest error in the calculation of the amount of recovery. It appears from the bill of complaint that the notes in controversy bore interest at the rate of six per centum per annum from date, and therefore complainant owed the interest on three hundred dollars from March 24, 1917, to the date of the payment to the trustee, amounting to twenty-three dollars and complainant was not entitled to recover this interest. If the appellee will enter a remittitur of twenty-three dollars, the decree of the lower court will be affirmed; otherwise it is reversed and remanded.

*Affirmed conditionally.*

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VAN NOY INTERSTATE CO. v. TUCKER.

[87 South. 643. No. 21686.]

**RAILMENT.** *Limitation on liability must be brought to owner's attention by bailee of baggage.*

Where baggage is checked by a company and the same is lost, the company is liable for its loss, and any contract limiting the liability of the company must be brought to the attention of the owner.

APPEAL from circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Action by Hugh Tucker against Von Noy Interstate Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*Wells, May & Saunders*, for appellant.

The question for this court to pass upon is one of first impression in this court so far as our investigation has enabled us to determine, and is this: Is the appellant protected by the limitation of liability endorsed on the check which was given to the appellee as evidencing the contract of bailment when the appellee deposited his suit case with the appellant?

Our contention is that the check is a good contract, one that it was competent for the parties to make, and that it affords protection to the appellant. If we are correct in this, the plaintiff was entitled to a judgment for ten dollars. And if this view is correct, of course, the judgment of the court below is wrong.

It is shown by the statement of facts on which the case was tried, that the appellant conducts a news stand and check room at the union Station in the city of Jackson, and that its facilities for handling the business is necessarily limited. Through some oversight or inadvertence, or by means of some outside agency the plaintiff's suit case was lost, mislaid or stolen. There was some one in charge of the place of business continuously from the time the suit case was delivered until it disappeared, and the possibility is that through some sort of oversight, the suit case was delivered to the wrong person. At any rate the agreed facts show that the appellee stands convicted of simple negligence, rendering it liable to the appellee in some amount. The claim check which was delivered to plaintiff, and which constituted a contract of bailment, as we contend, had printed in large type on the back, these words:

## TO THE HOLDER OF THIS CHECK :

"The Van Noy Interstate Company restricts its liability to a value of ten dollars which upon acceptance of this check is agreed upon. Penalty for loss of check fifty cents."

The charge for service rendered by the appellant, was the trifling sum of ten cents, plus ten cents for each twenty-four hours, or fraction thereof during which the suit case should remain in its possession. As we have stated, the question, therefore, squarely presented, is this:

Is the appellant liable for more than ten dollars the value limit on the check? We submit that the question is answered in the negative by the overwhelming weight of authority. The several phases of the question have been considered by the courts and textwriters of which we subjoin a selected list which seems to be squarely on the point presented, and which, we believe, sustains our contention.

It may be conceded that the bailee or warehouseman, may not contract against and limit his liability for fraud, or gross negligence, amounting to fraud, but the rule seems to be fairly well established that a private warehouseman; that is to say, one not classed as a public utility, and not regulated by law may, by contract fairly entered into, and expressly stipulated, limit his liability, and such limitation will be sustained, except in case of fraud, or gross neglect amounting to fraud. *Marx v. New Orleans Cold Storage Co.*, 90 Am. St. Reports. 285.

"Ordinarily by mutual agreement, the rights and liability of bailor or bailee may be restricted or enlarged at will. It is important to observe that the parties are not permitted to contract in contravention of positive law, or of public policy so as, for instance, to exempt a bailee from liability for a loss occurring through fraud or want of good faith, and it seems that they may not relieve themselves from the result of their own gross negligence." 3 R. C. L., par. 30, page 106.

It has been said by good authority that the bailee might contract not to be liable for any degree of negligence not amounting to gross negligence. Story on Bailments, sec. 32; Schouler on Bailees & Carriers, sec. 20.

A warehouseman may contract for a more restricted liability than that which the law imposes upon him; he may by agreement restrict his liability except as to loss occurring through fraud or want of good faith. *Gashweiler v. Wabash R., etc., Co.*, 53 Am. St. Rep. 563.

The court cites certain cases to support the rule stated and cites Story on Bailments (9 Ed.) section 79. Again the court said: "The right to limit its liability (is) a right beyond question, if it was a warehouseman." There is no principle in our law that would prevent a depositary from contracting not to be liable for any degree of negligence in which fraud was really absent. Story on Bailment, section 32.

The maxim of our jurisprudence is that *modus et conventio vincunt legem*, and it applies to all contracts not offensive to sound morals or to positive prohibition by the legislature. Story, *supra*.

The legal responsibility of the bailee (except perhaps in the case of common carriers) may be narrowed by any special contract, either express or implied so it may in like manner be enlarged. Story, section 33.

The rule of the civil law is on this point conformable to ours. Story, section 34.

"Effect of clause or notice limiting liability. The majority of cases hold that while a carrier who accepts baggage in its parcel room on payment of a fee is liable for ordinary negligence, the bailor or depositor is presumed to have knowledge of a conditional or stipulation printed on the duplicate parcel check, limiting the carrier's liability to a sum stated thereon, and is bound by the provisions printed on the check." *Terry v. Southern R. Co.* (1908), 81 S. C. 279, 18 L. R. A. (N. S.) 295, 62 S. E. 249; *Van Toll v. Southeastern R. Co.* (1862), 12 C. B. (N. S.) 75, 142, Eng. Reprint, 1071, 8 Jur. (N. S.) 1213, 31 L. J. C.

P. (N. S.) 241, 6 L. T. (N. S.) 244, 10 Week. Rep. 578; *Harris v. Great Western R. Co.* (1876), L. R. 1 Q. B. Div. (Eng.) 515, 45 L. J. Q. B. (N. S.) 729, 34 L. T. (N. S.) 647, 25 Week. Rep. 63; *Pratt v. Southeastern R. Co.* (1897), 1 Q. B. (Eng.) 718, 66 L. J. Q. B. (N. S.) 418, 76 L. T. (N. S.) 465, 45 Week. Rep. 503; *Lyons v. Caledonia R. Co.* (1909), S. C. 1185, 46 Scot. L. R. 848; *Pepper v. Southeastern R. Co.* (1868), 17 L. T. (N. S.) (Eng.) 469; *Skipwith v. Great Western R. Co.* (1888), 59 L. T. (N. S.) (Eng.) 520; *Henderson v. Northeastern R. Co.* (1861), 9 Week. Rep. (Eng.) 519, 4 L. T. (N. S.) 216; *Dorin v. Grand Trunk R. Co.* (1917), Rap. Jud. (Quebec) 53 S. C. 106; Compare *Parker v. Southwestern R. Co.* (1877), L. R. Q. C. P. Div. (Eng.) 416, 46 L. J. C. P. (N. S.) 768, 36 L. T. (N. S.) 540, 25 Week. Rep. 564.

In *Terry v. Southern R. Co.* (1908), 81 S. C. 279, 18 L. R. A. (N. S.) 295, 62 S. E. 249, it appears that the plaintiff checked a suit case at the defendant's parcel room, receiving a receipt therefor, containing the following stipulation: "The party accepting this check hereby agrees, in consideration of the low rate at which it is issued, that no claim in excess of ten dollars shall be made against the railroad company for loss of or injury to any package, valise or other article which may have been deposited with it, and for which this ticket has been issued." The suit case having been lost while in the possession of the bailee, the court held that the defendant was clearly liable for its negligence, but that its liability was limited to ten dollars as stated in the receipt.

In *Van Toll v. Southeastern R. Co.* (1862), 12 C. B. (N. S.) 75 142 English Reprint, 1071, 8 Jur (N. S.) 1213, 31 L. J. C. P. (N. S.) 241, 6 L. T. (N. S.) 244, 10 Week. Rep. 578. It appeared that a passenger deposited a bag containing certain valuables in the defendant's cloak room, maintained for that purpose at its depot, and, on payment of a small charge received in return a receipt, which contained thereon a stipulation printed in large type, to the effect that the company would not be responsible for arti-

cles of value in excess of ten dollars. The court held, it appearing that the bag and its contents amounted to more than the sum specified, that the defendant was not liable for the loss, as the plaintiff, bailor was bound by the terms printed on the check, she being presumed to know the provisions thereof. See to the same effect *Henderson v. Northeastern R. Co.* (1861), 9 Week. Rep. (Eng.) 519, 41 L. T. (N. S.) 216.

In *Harris v. Great Western R. Co.* (1876), 45 L. J. Q. B. (N. S.) (Eng.) 729 L. R. 1 Q. B. (Div.) 515, 34 L. T. (N. S.) 647, 25 Week Rep. 63, wherein it appeared that the plaintiff deposited her luggage in the defendant's cloak room and received a check which stipulated that it was issued and received subject to certain limitations of liability printed thereon, the court held, that, although the plaintiff had not read the conditions printed on the receipt, it must be presumed that she deposited her luggage subject thereto and that, not having complied therewith, she could not recover the value of her baggage.

In *Pratt v. Southeastern R. Co.* (1897), 1 A. B. (Eng.) 718, 66 L. J. Q. B. (N. S.) 418, 76 L. T. (N. S.) 465, Week. Rep. 503, the court held that a provision on a parcel check, to the effect that the company designated value, meant that it would assume no liability for an article exceeding that value, and that the provision "was a good defense to an action to recover damages for an injury to an article of greater value than that stipulated in the check. See to the same effect *Skipwith v. Great Western R. Co.* (1888), 59 L. T. (N. S.) (Eng.) 520, where in the article deposited was lost by misdelivery to another person.

We respectfully submit upon the authorities hereinbefore cited, the demurrer to the declaration ought to have been sustained and the suit ought to have been dismissed, and certainly it was error for the court to render judgment for more than ten dollars.

The special plea (record page —), setting up the fact that the contract of bailment limited the liability to ten dollars was abundantly established by the agreed state-

ment of facts, viz. That there was no contract between the parties other than which was evidenced by the check. We call the court's attention particularly to this clause in the agreement: "The said suit case was placed on the platform or counter aforesaid and a check was attached thereto, and the duplicate attached and delivered to said Hugh Tucker in exchange for the sum of ten cents. The said duplicate check so delivered to the said Hugh Tucker being filed as Exhibit A to the plaintiff's declaration, and made a part of this agreement."

There was no conversation between the agent of the defendant and the plaintiff regarding the transaction of checking said suit case, and the plaintiff after receiving said check, without reading it or actually knowing its contents, placed it in his pockets and went about his affairs.

The said agreed statement of facts therefore shows that the check was attached to the suit case and exchanged with the plaintiff for a fee of ten cents; that there was no conversation or other negotiations between the plaintiff and defendant's agent.

We submit that it thus clearly appears that if the appellee had any contract at all, that contract is evidenced by the check, and the check limits the liability of the appellant to ten dollars. If the check did not evidence the contract, then there was no contract, and there is no liability. If it does evidence the contract and if it does render the appellant liable, it must be treated as an entire thing, because the appellee cannot depend and rely upon that part which is favorable to him and reject the provision which is favorable to the appellant. The authorities which we have cited clearly demonstrate that the acceptance of this instrument of writing, without reading its contents, will not enable the appellee to set up a claim of ignorance to avoid the contract; and this court has frequently ruled that a receipt in common form containing the terms of a contract, is something more than a mere receipt, and is binding on the parties, and the limitation of liability will be enforced. See *Express Company cases*.

cited *supra*, and the rule quoted from R. C. L. And other decisions cited *supra*.

We submit, both upon reason and authority that the judgment of the lower court is wrong. For the court to hold that appellant is liable to the appellee in excess of ten dollars would be for the court to decline to enforce the contract which the parties made for themselves, and to make a new contract at the instance of the bailor, the appellee, without the consent and over the protest of the appellant, who was the bailee.

The court may think the contract is a hard one from the standpoint of the appellee, but the court should bear in mind that for the service rendered, the appellant received but the trifling sum of ten cents, and it was but the part of prudence for it to limit its liability. If the appellant should engage in the business of checking baggage sometimes of great value, and assume full liability therefor, receiving only a nominal compensation the small profits which it would make would clearly be greatly disproportioned to the hazard which it would assume.

*Robt. Powell*, for appellee.

It is claimed by the appellant as a defense in this case that the claim check copied above was a contract between the parties which they had a right to make and which limited the liability of appellant to the sum of ten dollars, and that therefore the suit having been brought in the circuit court the amount involved was not within the jurisdiction of that court and the judgment should have been for the defendant in the court below. Our contention is:

First. That the claim check was not a contract between the parties, but was simply an identification card that the real contract between the parties was an implied one arising out of the transaction.

The court will see further from an examination of the check that it does not claim to be any thing more than an

identification card for it says itself it is a "claim check" only.

Second. We claim that if the claim check was a contract then its limitation of liability was not binding, because it was not given with the full knowledge on our part of its contents. This is agreed to be true in the agreed statement of facts.

We cite the court on this point to *Southern Express Company v. R. A. Moon*, 39 Miss. 822, and *Mobile & O. R. R. Co. v. Franks*, 41 Miss. 494, in which this court says: "If a contract by which a common carrier limits its liability is under any circumstances binding, it is essential to its validity that the assent of the shipper should be express and upon a sufficient consideration and to be freely and fairly given with the full knowledge of the contract and the rights thereby waived and that it should not be obtained by fraud and the circumstances not favorable to full understanding of the force and effect of the contract, and it was further said that the exception would be strictly construed against the carrier and that it will never be extended so as to relieve him from responsibility for the loss occasioned by his negligence and moreover the *onus* is on the carrier to show that the loss was within the exceptions."

This case seems to cover the case at issue like a wet blanket.

Third. We say that if this claim check is a contract, then it was a contract to relieve the company from its own negligence and consequently void. We quote from the opinion of this court in *Southern Express Co. v. R. A. Moon*, 39 Miss. 822: "Exceptions in a common carrier's receipt, limiting his common-law responsibility are strictly construed against the carrier and are never extended to relieve from responsibility for a loss occasioned by its own negligence." See, also, *Express Co. v. Marks & Rothenberg*, 87 Miss. 659; *So. Express Co. v. Seile*, 67 Miss. 609.

"A common carrier cannot stipulate against liability for the loss occasioned by its negligence. *New Orleans R. R. Co. v. Faler*, 58 Miss. 911; *Mobile & O. R. R. Co. v. Weiner*, 49 Miss. 725; *Chicago R. R. Co. v. Moss*, 60 Miss. 1003.

It is true that the authorities heretofore cited in this brief are those in cases of contracts against negligence by common carriers. We can see no reason why the same principle should not apply to the business conducted by appellant in this case, although we believe that the precise point has never been adjudicated in this state.

In the particular case before the court in the hurry of travel the appellee left his baggage with appellant and after it was received the claim check in question was shoved out to him and he put it in his pocket he not dreaming that he was parting with his property under an agreement not to demand more than ten dollars in case of its loss, and when appellee called for his baggage no excuse whatever was given why it was not returned to him and no explanation attempted in regard to the same.

If the appellant could escape liability under such circumstances it would look like offering a premium to dishonest parties to appropriate valuable baggage and pay only a trifling amount for its loss. If a scheme of this kind were legal it would be a bonanza to unscrupulous parties.

But should we concede every point made by appellant in its brief we are still entitled to recover for the reason that the appellant in this case was guilty of gross negligence in dealing with the property in question for at least the jury or the court sitting as a jury had the right to infer gross negligence because appellant utterly failed to give any excuse for failing to redeliver the valise to appellant when called for. We cite the court on this point to the cases of *Sternberger v. Western Union Telegraph Company*, 97 Miss. 260; *Telegraph Cable Co. v. Christian*, 102 Miss. 851.

The court will observe that all of the authorities cited by appellant in its brief contracts of this character are

void where there is gross negligence. For these reasons we think the judgment of the court below was correct and should be affirmed.

SAM C. COOK, P. J., delivered the opinion of the court.

This is a suit for the value of a suit case and its contents, delivered to the appellant as a bailee for hire. The case was submitted to the trial judge without the aid of a jury upon the following agreed statement of facts, viz.:

"It is agreed between the parties hereto that this cause may be heard and determined by the trial judge without the aid of a jury on the following agreed statement of facts:

"The defendant, the Van Noy Interstate Company, is engaged, among other things, at Jackson, Miss., in conducting what is called 'a parcel check room' where small parcels are checked for a small consideration paid in each instance; that said business of conducting a parcel check room is carried on in the southwest corner of the general waiting room in the Union Station, the space occupied by the said defendant in connection with said business being approximately ten feet square. The manner of carrying on the business of checking parcels is as follows: A person, desiring to deposit a parcel with the defendant for temporary keeping, presents the parcel to the defendant at said place, there being a small platform or counter upon which it is customary for suit cases or other parcels to be placed, whereupon the defendant attaches to the said parcel a pasteboard check, which is made in duplicate, and from the check so attached to the parcel the duplicate is detached and delivered to the person checking the parcel in exchange for the fee charged for such checking service, which is ten cents for each parcel, and the duplicate check so delivered is presented by the holder for the purpose of obtaining the parcel so checked when it is desired to take the parcel from the check room.

"On the 8th day of May, 1920, the plaintiff, Hugh Tucker, presented to the defendant to be checked a certain suit case and contents of the agreed value of two hundred fifty dollars, and the said suit case was placed on the platform or counter aforesaid, and a check was attached thereto, and the duplicate detached and delivered to the said Hugh Tucker in exchange for the sum of ten cents. The duplicate check so delivered to the said Hugh Tucker being filed as Exhibit A to the plaintiff's declaration and made a part of this agreement. There was no conversation between the agent of the defendant and the plaintiff regarding the transaction of checking the said suit case, and the plaintiff after receiving said check without reading it, or actually knowing its contents, placed it in his pocket and went about his affairs until some time within the twenty-four hours next ensuing, when he returned to the defendant's place and presented the said check and demanded the return of his said suit case. The defendant did not return the said suit case which was not found in the defendant's premises, and which had disappeared therefrom in some way and manner unknown both to the plaintiff and the defendant and the defendant's employees. There was an agent of the defendant in charge of the said check room continuously from the time the said suit case was so delivered until the plaintiff presented his check and demanded the delivery to him of the said suit case. The said check room where the said suit case was deposited is used also for keeping miscellaneous small articles for sale, and has a window on the west side, which opens out on the station platform, and another on the south side, which opens on the station platform on the south side, through which windows it is possible to make delivery or parcels checked and other articles. Said west window is commonly used for that purpose, but the south window is seldom used for that purpose. The most of the business of receiving and delivering parcels and selling other small articles is transacted over the counter or platform on the inside of the

waiting room, at which place the plaintiff's suit case was checked."

The check referred to in the agreement of facts had printed on it the following:

"Claim check. See other side.

10 cents for each 24 hrs. or fraction thereof

10 20 30 40 50

60 70 80 90 1.00

"No. 3145."

The circuit judge adjudged the defendant liable for the actual value of the suit case and its contents, and defendant appeals.

We have made quite a search for authorities applicable to the facts of this case, and we have but one decision which we deem decisive of this appeal. The authorities generally lay down the rule that bailees for hire are ordinarily liable for the value of goods or other things lost, and any limitation of that rule must be brought to the attention of the owner of the goods. So we think the question here is, Was the bailor advised of the limitation written upon the pasteboard check delivered to the owner of the suit case?

In a case decided by the Appellate Division of the Supreme Court of New York, *Healy v. N. Y. C. & H. R. R. Co.*, 153 App. Div. 516, 138 N. Y. Sup. 287, in a case very much like the case made by this record, had this to say, viz.:

"The coupon was presumptively intended as between the parties to serve the special purpose of affording a means of identifying the parcel left by the bailor. In the mind of the bailor the little piece of cardboard, which was undoubtedly hurriedly handed to him and which he doubtless as hurriedly slipped into his pocket, without any reasonable opportunity to read it, and hastened away without any suggestion having been made upon the part of the parcel room clerk as to the statements in fine print thereon, did not arise to the dignity of a contract by which he agreed that in the event of the loss of the parcel, even

through the negligence of the bailee itself, he would accept therefor a sum which perhaps would be but a small fraction of its actual value.

"The plaintiff having had no knowledge of the existence of the special contract limiting the liability of the defendant to an amount not exceeding ten dollars, and not being chargeable with such knowledge, the minds of the parties never met thereon, and the plaintiff cannot be deemed to have assented thereto, and is not bound thereby."

We adopt the decision of the New York court as the law of this case.

*Affirmed.*

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WILSON v. HENDRIX.

[87 South. 645. No. 21692.]

**BASTARDS.** *Instruction limiting consideration to intercourse by defendant held erroneous under evidence.*

In a bastardy case it is error to instruct the jury that the "sole and only question in this case is whether or not the defendant had intercourse with the prosecutrix at or near the proper time which in the course of nature would or might make him the father of her child," when there was evidence to support the theory that another man had probably had intercourse with the prosecutrix within the period of gestation.

APPEAL from circuit court of Lauderdale county.

HON. J. D. FATHERREE, Judge.

Bastardy proceedings by Marvella Hendrix against Archie Wilson. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

*R. J. Cochran*, for appellant.

The second and third instructions tell the jury that if they believe from a preponderance of the evidence that the

appellant had intercourse with appellee, at or near the proper time which in course of nature would or might make him the father of her child, then it is the duty of the jury to return a verdict for the prosecutrix.

This instruction simply authorized the jury to make a guess as to whether the defendant was guilty or innocent. If these instructions declare the law, they would also be the law if a half dozen other men were having intercourse with the prosecutrix at the same time, and each of them was tried just as appellant had been tried.

The fourth instruction is more erroneous than either the second or the third. It tells the jury that if they believe from a preponderance of the evidence that the defendant Archie Wilson, had intercourse with Marvella Hendricks at or near the time when from the evidence the child must have been conceived, and that he is probably the father of the child, then it is the sworn duty of the jury to find for the prosecutrix.

We say that a fair understanding and analysis of the record in this case will lead an unprejudiced mind to the conclusion that the defendant is innocent, and that the burden that the jury has fixed upon him is wrong and unjust, and in view of the vicious instructions which were granted appellee by the court, we earnestly ask the court to reverse the finding of the court below.

*F. K. Ethridge*, for appellee.

The first and most serious ground urged by the appellant for reversing this case is because the court erred in granting instructions two, three and four for appellee. We submit that if the court erred in granting said instruction that said errors were cured by the instruction by the court for the appellee which told the jury: "The court charges the jury for the defendant that the burden is on the plaintiff Marvella Hendricks to prove by a preponderance of the evidence that the defendant is the father of her child, and if the jury believes from the evidence that

the plaintiff has failed to meet that burden then it is the sworn duty of the jury to find for the defendant." We submit, however, the court was not in error in granting these instructions, because this court has held in the case of *Sidney Johnson v. Katie Lou Walker*, 86 Miss. 757 to 768: "It is only material that the defendant had intercourse with her at or near the proper time which, in the course of nature might have made him the father of the child."

The instructions complained of simply told the jury, taken with the instruction above quoted for the appellant, that if they believed from a preponderance of the evidence that the appellant had intercourse with Marvella Hendricks at a time which within the course of nature might have made him the father of the child as decided by this court, then they should so find and fix the amount of the support of the child at whatever sum from the testimony might appear to them to be reasonable until the child should have reached the age of eighteen years. The jury was not authorized under the instructions to guess as to whether or not the defendant Archie Wilson was the father of the child . . . They were sworn when they were empaneled to decide on the testimony as adduced on the trial and to apply the law as given them by the court. It is not presumed that a jury of good and lawful men are going out into the realms of conjecture and supposition but will be guided and governed solely and exclusively by the law as given them by the court. There is no testimony that the appellee Marvella Hendricks had had intercourse with other men at or near the period of gestation. If the testimony of Mattie Thames could be taken as indicating such, the jury who saw the witness upon the stand, heard statements, observed her manner and demeanor on the stand, and heard the testimony of the other witnesses denying such testimony, we submit that this jury are the best judges of the weight, worth and credibility of the witness' testimony, and they certainly found adversely thereto.

SAM C. COOK, P. J., delivered the opinion of the court.

The appellee instituted this suit in the circuit court of Lauderdale county. The suit is commonly known as a bastardy suit. The plaintiff was a colored damsel and estimated variously to tip the scales from three hundred to three hundred fifty pounds.

According to the version of the plaintiff the bastard was begotten in a buggy. The learned counsel for the defendant insists that the story of the plaintiff is contrary to human experience and was physically impossible. Fortunately, we are not necessarily required to decide between the conflicting theories of learned counsel, neither of whom qualified as experts.

There was evidence which would warrant the conclusion that the prosecutrix was not a chaste woman at the time the bastard was begotten, but, to the contrary, within the period of gestation another man had such associations with the plaintiff as would warrant the belief that the woman was not chaste, and if the jury believed this evidence, they would be warranted in believing that the plaintiff had not made out such a case as to warrant a verdict in her behalf.

We refrain from going into the salacious details. In this state of the record the court, at the request of the plaintiff, instructed the jury as follows:

"The court charges the jury for plaintiff that while the law places upon her the burden of proving her case by a preponderance of the testimony, this does not mean that she must prove to a moral certainty and beyond every reasonable doubt that Archie Wilson is the father of the child, but if the plaintiff has shown by a preponderance of the testimony that the defendant had intercourse with her at a time which within the course of nature he would or might be the father of her child, then it is your sworn duty to find for the plaintiff in such sum as may be necessary to support said child not to exceed the amount sued for.

"The court charges the jury for the plaintiff that the sole and only question in this case is whether or not the defendant had intercourse with the prosecutrix at or near the proper time which in the course of nature would or might make him the father of her child, and if you so believe from a preponderance of evidence, then it is your sworn duty to find for the plaintiff in such sum, not to exceed the amount testified to, as to you may seem necessary for the support and maintenance of said bastard child until it shall reach the age of eighteen years."

These instructions were peremptory instructions for the plaintiff and should not have been given.

*Reversed and remanded.*

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MCNEILL v. MCNEILL.

[87 South. 645. No. 21682.]

1. DIVORCE. *Acts of cruelty need not be malicious to constitute ground parties in pari delicto.*

In an action for divorce based upon the ground of habitually cruel and inhuman treatment, it is not necessary that the acts of alleged cruelty shall be malicious; such acts are to be judged by the effect produced, and the motives prompting them are immaterial.

2. DIVORCE. *Sufficient if acts of cruelty create reasonable apprehension of danger to life or health.*

In an action for divorce based upon habitually cruel and inhuman treatment, in order that the complaining party may be entitled to relief, it is not necessary that the acts of alleged cruelty shall be, in fact, menacing to the life or health of complainant; but, if the alleged acts of cruelty are such as to create in the mind of the complainant a reasonable apprehension of such danger, relief should be granted.

APPEAL from chancery court of Hinds county.

HON. V. J. STRICKER, Chancellor.

Suit by Nannie W. McNeill against Henry W. McNeill, with cross-bill by defendant. Relief was denied to both parties, and complainant appeals. Reversed and remanded.

W. E. Morse, for appellant.

The court erred in ruling that in cruel and inhuman treatment there must be shown malice. This is apparent from the ruling of the supreme court in other cases. Malice is an element of criminal law but is not necessary to constitute cruel and inhuman treatment.

Our court has held to the theory and the majority of courts hold that way that it is the protection of the party from injury and not the punishment of malice which authorizes a decree for cruel and inhuman treatment. There seems to be about six states which hold that malice must be shown, but their statute is slightly different from ours and their ground is cruel and barbarous treatment.

Mr. McNeill may have acted without malice; we do not concede that he did, when he went in Mrs. McNeill's room and made the threat catching her by the arm and drawing his knife and stating that "we will both die together," I say that he may have acted without malice, but Mrs. McNeill could not tell, and she was so badly frightened that she jerked away and ran into another room. If he was simply acting a part he certainly fooled both Mrs. McNeill and his son who stated that "he looked like he was going to kill her." 73 Am. Dec. 624, Note:

"Motive in inflicting cruelty immaterial. The test by which acts of alleged cruelty are to be judged being whether or not they were dangerous to life, limb, or health or created a reasonable apprehension of such danger, the motive which incites the commission of the acts is immaterial. They may have been the promptings of an unloving and malignant heart, the impulses of a debased and

brutal nature; or they may have been occasioned by a mad jealousy which sprung from an excessive love and devotion. In speaking of misconduct arising from jealousy, the court in *Kirham v. Kirham*, 1 Hag. Con. 409, 4 Eng. Ecc. 438, says that jealousy is a passion producing effects as violent as any other passion, and there will be the same necessity to provide for the safety and comfort of the individual. If that safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone." So in *Westmeath v. Westmeath*, 4 Hag. Ecc. Supp. 1, 4 Eng. Ecc. 238, 271, it is said: "It is not necessary to inquire from what motive such treatment proceeds. It may be from turbulent passion, or sometimes from causes not in consistent with affection. If bitter waters are flowing, it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his control as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocations such violence originated." The same is the law of Holden, 1 Hag. Con. 453; 4 Eng. Ecc. 452.

Divorce is granted for protection, not as punishment. Courts interfere to grant divorces for cruelty, not so much as a punishment for an offense already committed as to relieve the complainant from an apprehended danger; punishment for past misconduct may enter into the judgment, but the divorce is granted mainly as a protection against future probable acts of cruelty; this probability being based upon the former conduct, and the character and disposition of the parties. The proceeding is in effect *quia timet*. It is for safety in the future, not retribution in the past. Bishop on Mar. & Div., sec. 719; *English v. English*, 27 N. J. Eq. 579, 585; *Cook v. Cook*, 11 Id. 195. All these cases recognize this principle.

Our law is taken largely from the English common law and our equity from the ecclesiastical law of England, and it is their interpretation that reasonable apprehension of bodily harm is an element of cruel and inhuman treatment

and is sufficient to entitle a person to a divorce if they can come within that rule. Our own court has adopted this rule and announced it in the case of *Kinley v. Kinley*, 2 Howard 751, which decision has been reaffirmed by this court. *Humble v. Humble*, 68 So. 161; *May v. May*, 62 Pa. (12 P. F. Smith) 206, 210; *Waldron v. Waldron*, 24 Pac. 649, 650, 85 Cal. 251, 9 L. R. A. 487; *Morris v. Morris*, 14 Cal. 76, 77, 73 Am. Dec. 615; *Butler v. Butler* (Pa.), 1 Pars. Eq. Cas. 324, 344; *Richards v. Richards* (Pa.), 1 Grant. Cas. 389, 391; *Gordon v. Gordon*, 48 Pa. (12 Wright) 226, 238; *Uhlmann v. Uhlmann* (N. Y.), 12 Abb. N. C. 236, 237; *Perry v. Perry* (N. Y.), 2 Paige, 500; *Mason v. Mason* (N. Y.), 1 Edw. Ch. 278, 291; *Kennedy v. Kennedy*, 73 N. Y. 369, 373; *Cole v. Cole*, 23 Iowa, 433, 438; *Wheeler v. Wheeler*, 5 N. W. 689, 692, 53 Iowa, 511, 36 Am. Rep. 206; *Williams v. Williams*, 2 So. 768, 769, 23 Fla. 324; *Holyoke v. Holyoke*, 6 Atl. 827, 828, 78 Me. 404; *Odom v. Odom*, 36 Ga. 286, 317; *Holt v. Holt*, 117 Mass. 202, 204; *Bailey v. Bailey*, 97 Mass. 373, 380, 381; *Ratts v. Ratts*, 11, 111 App. (11 Bradw.) 366; *Gibbs v. Gibbs*, 18 Kan. 419, 423; *Tayman v. Tayman*, 2 Md. Ch. 393, 399; *Daiger v. Daiger*, Id. 335, 340; *Hawkins v. Hawkins*, 3 Atl. 749, 750, 65 Md. 104; *Hughes v. Hughes*, 19 Ala. 307, 309; *Thornberry v. Thornberry*, 25 Ky. (2 J. J. Marsh) 222, 323; *Cline v. Cline*, 10 Or. 474, 475. And the courts adjudged such a state of things as sufficient cause for a decree of separation on the ground that, in a state of personal danger, no duties to another can be perfectly performed for the reason that under such circumstances the duty of self-preservation, which is primary in its commencement and paramount in obligation, is superior to the duties imposed by the marital connection, and when called into action, is inconsistent with those duties and renders their discharge impossible. *Rose v. Rose*, 9 Ark. (4 Eng.) 507, 513. And such acts will constitute cruel and abusive treatment, within the meaning of a statute authorizing a divorce for such cruelty. *Lyster v. Lyster*, 111 Mass. 327, 329. And see, also, *Williams*

v. *Williams*, 28 Pac. 726, 728, 1 Colo. App. 281; *Sharman v. Sharman*, 18 Tex. 521, 525.

*M. Ney Williams*, for appellee.

The act of violence complained of admittedly not with malice, but a pretended threat purportedly to restrain complainant from abandoning defendant is not sufficient in law for a divorce, and especially when the abandonment was the provocation for the pretended threat.

Cruel and inhuman treatment must be habitual, malicious and menacing to life or health. The testimony in this record does not indicate a situation of that kind. The act of violence testified to by appellant was partially corroborated by her son, Lloyd McNeill, but wholly denied by appellee. In applying the law the learned chancellor took the evidence of the acts of violence, of all three of the parties in the room, and after consideration, found in favor of the appellee. The appellant contends that the alleged act of violence constituted habitual, cruel and inhuman treatment on the part of appellee, and that under the proof and of the law, that the lower court erred in dismissing her bill and denying her a divorce, and in her contention counsel for appellant chiefly rely upon the well known case of *Humber v. Humber*, 68 So. Rep. 161.

Quoting from the *Humber* case the court said: "Marriage is a most solemn contract, provided for by the laws of the state and sanctified by the ceremonies of the church. The dissolution of its bonds is no light matter. The best sentiment of society is opposed to divorce. The law authorizing divorces for certain causes requires a strict compliance with its provisions."

It is contended here by the appellant that the act of violence of Mr. McNeill caused appellant to have a fear of losing her life or suffering bodily harm at his hand, and that there was danger of her health being impaired by said acts. The original bill of appellant in this cause charges that appellant apprehended that her husband

would do her some injury and that it was not safe for them to live together. The evidence of appellant and her son Lloyd McNeill was heard on this, and the chancellor held that the evidence was insufficient to sustain the case.

A single act of cruelty does not ordinarily constitute ground for divorce, although a fixed or persistent habit of cruelty need not appear. See 14 Cyc., p. 601. Ordinarily intention, willfulness, or malice is a necessary element of the cruel treatment which the law recognizes as a ground for divorce. (See 14 Cyc., p. 601.)

The testimony of Mrs. McNeill, the appellant, shows that the threat made against her by appellee on said night did not cause her to have any fear of losing her life, or of suffering impaired health, and caused her to have no belief that she and Mr. McNeill could not longer safely live together and cohabit as man and wife. The very next morning after the threat of the night before we find Mrs. McNeill in Mr. McNeill's room cleaning it up and carrying on her household duties as if nothing had happened. Page 67 of the Record of Mrs. McNeill's testimony shows the following: "The night that he came in and threatened my life with the knife, he went on out, and the next morning when I was cleaning up his room I found the knife, and I says to myself, 'Well, he will never threaten we with this knife again.' And I took it and locked it up."

We respectfully submit that the learned chancellor was correct in dismissing the bill in the court below and denying the relief prayed for, as the proof in this case does not support the allegation in the pleadings of the appellant. This case should be affirmed at the cost of appellant.

W. H. COOK, J., delivered the opinion of the court.

Mrs. Nannie W. McNeill, appellant, filed her bill in the chancery court of the Second district of Hinds county seeking a divorce from her husband on the ground of habitually cruel and inhuman treatment, and praying for

temporary and permanent alimony. The husband, H. W. McNeill, filed his answer to the bill, denying the allegations thereof, and made his answer a cross-bill in which he sought a divorce on the ground of desertion for the statutory period, and upon the final hearing a decree denying a divorce to both parties was entered, and from this decree Mrs. McNeill prosecuted this appeal.

The conclusion which we have reached in this case makes it unnecessary to state the facts, and we decline to express any opinion as to the facts or the merits of the unfortunate disagreement between these parties; but we are of the opinion that, in passing upon the facts before him, the chancellor has applied an erroneous rule of law.

The final decree as entered recites that the court doth find as follows:

"That the complainant, Mrs. Nannie W. McNeill, is not entitled to the relief prayed for because of the act of violence, or one of the acts complained of, was made without malice; that the threat made by Henry McNeill was a pretended threat the purpose of which was to restrain the complainant from abandoning defendant, and that a threat is not sufficient in law for a divorce, especially where the abandonment was the provocation of the threat.

"The court doth further find that to warrant a divorce upon the grounds of cruel and inhuman treatment, that the cruel and inhuman treatment complained of must be habitual, malicious, and menacing to life or health. The testimony in this record does not indicate a situation of that kind."

The announcement that to warrant a divorce on the ground of cruel and inhuman treatment, the cruel and inhuman treatment must be habitual, malicious, and menacing to life or health, is erroneous in two respects. It is difficult to formulate an accurate definition of "cruel and inhuman treatment," as used in our statutes on divorce, which will cover all cases, and while the courts must adjudicate each case upon its own facts, the acts of alleged cruelty are to be judged by the effect produced and not by

the motive prompting the act. A malicious motive is not the test, and if the cruel and inhuman effect is produced by the acts and conduct complained of, it is immaterial whether such acts spring from the promptings of a malicious heart or from other motives.

The pronouncement that the cruel and inhuman treatment must also be menacing to life or health is also erroneous. It makes the right to relief depend upon the actual existence of danger to life or health and excludes a reasonable apprehension of such danger. In order that the complaining party may be entitled to relief, it is not necessary that danger to life or health shall in fact exist; but if the acts of cruelty are such as to create in the mind of the complainant a reasonable apprehension of such danger, relief should be granted.

In holding that to warrant a divorce on the ground of cruel and inhuman treatment the complaining party must show acts of cruelty which were malicious and actually menacing to life or health, the learned chancellor had applied to the facts in this case an erroneous test and one that is entirely too severe, and for this error this cause is reversed and remanded.

*Reversed and remanded.*

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LOWENBURG v. KLEIN *et al.*

[87 South. 653. No. 21683.]

1. **CONTRACTS.** *Courts will not grant relief on illegal contract when parties in pari delicto.*

When an action is based upon a contract which is in violation of the laws of the state, and the parties to the action are *in pari delicto*, our courts will not entertain a suit for the relief of either against the other, but will leave them in their respective conditions.

2. INJUNCTION. *Attorney's fees not allowable on dissolution of injunction to enforce illegal agreement.*

Since the courts will not grant relief to either party to an illegal contract, when a suit for injunction is based upon an illegal agreement, and the parties thereto are *in pari delicto*, attorney's fees should not be allowed to the defendant upon the dissolution of the injunction.

APPEAL from chancery court of Warren county.

HON. E. N. THOMAS, Chancellor.

Suit by Joseph Lowenburg against Joseph Klein and others for an injunction. From a decree dissolving a preliminary injunction and dismissing the bill, plaintiff appeals. Affirmed in part, and reversed in part.

*Anderson, Voller & Kelly*, for appellant.

While this action is in form asking for affirmative relief, it is in nature strictly a defensive one.

Mr. Pomeroy, in the 2nd Volume of the Fourth Edition of his great work on Equity Jurisdiction, in discussing this whole question, applicable not only to the proposition in hand, but to several of the others, uses this language, under the head of *In pari delicto*—general rules.—“The proposition is universal that no action arises, in equity or at law, from an illegal contract; no suit can be maintained for its specific performance, or to recover the property agreed to be sold or delivered, or the money agreed to be paid, or damages for its violation. The rule has sometimes been laid down as though it were equally universal, that where the parties are *in pari delicto*, no affirmative relief of any kind will be given to one against the other. This doctrine, though true in the main, is subject to limitations and exceptions which it is the special object of the present inquiry to determine. As applications of this principle, the following rules may be regarded as settled, where the parties are *in pari delicto*. If the contract had been voluntarily executed and performed, a court of equity will not, in the absence of controlling motives of public policy

to the contrary, grant its aid by decreeing a recovery back of the money paid or property delivered, or a cancellation of the conveyance or transfer. As long as the contract is executory, it cannot be enforced in any kind of action brought directly upon it; the illegality constituting an absolute defense. As an application of the same doctrine merely in a different form, while the agreement is executory, courts of equity may relieve the debtor or promising party by ordering the written instrument and other securities to be surrendered and cancelled, and by granting the ancillary remedies of injunction, discovery, and the like. Whenever the circumstances are such that the defensive remedy at law would not be equally certain, perfect, and adequate, this jurisdiction will be exercised. The equitable relief so conferred does not violate the general maxim concerning parties *in pari delicto*; on the contrary, it carries that maxim into effect. It has already been shown that the maxim, rightly interpreted, does not require the condition of the parties, with respect to the substituting executory contract, to remain unchanged and undisturbed. The remedy of cancellation or injunction, under the circumstances, is simply the equitable proceeding identical with the setting up the illegality as a defense to defeat a recovery at law, and thus get rid of the contract as a binding executory obligation. The parties are left undisturbed as to their property rights." Section 940, pages 1992 to 1997.

2. The contract involved in this proceeding, while against public policy and illegal, is executory and not executed, and, as already seen in the quotation from Mr. Pomeroy, *supra*, the rule is very different in the two cases. The rule as to executory contracts, where the parties stand *in pari delicto* is, that while they cannot be enforced either by specific performance or by an action for damages on account of the breach, either party may stop the consummation of the contract on his part by an action to rescind and recover back what may have been paid by him in consummation of the transaction. Especially is this true when

the proceeding, as the one at bar, is to stop the payment of the money, or the cancellation of a check given in pursuance of the illegal transaction. 2 Pomeroy (4 Ed.), secs. 940 & 941; *Spring Company v. Knowlton*, 103 U. S. —, 26 L. Ed. 347; 3 Comyn on Contracts, 361; 2 Parsons on Contracts, page 746; *Blook v. Darling*, 140 U. S. —, 35 L. Ed. 476; *Bernhard v. Taylor* (Ore.) 31 Pac. 968. Citing many authorities in support of the doctrine. See, also, *Hazard v. Coyle* (R. I.), 48 Atl. 442, 443 & 444; *Day v. Loun*, 51 Iowa, 364, 1 N. W. 786; *Cleveland, etc., Ry. Co. v. Hirsch* (C. C. A.), 204 Fed. 848-858; 2 Words & Phrases (2 Series), pp. 990, 991; *McCutcheon v. Capsule Co.*, 145 U. S. 470, 36 L. Ed. 748.

The rule is thus announced in 23 Cyc., page 343, paragraph D: "Although an executory contract for the illegal sale of liquor may be rescinded and partial payments reclaimed, yet if the contract had been fully executed, no action will lie, at common law, to recover back the price or value of the liquor." This is practically a "goose" case, and covers the facts in this case like a blanket.

3. The real and controlling object of the section was to prevent the bank's paying the illegal check given by complainant to Klein. As observed under the head of this proposition, *supra*, there was never any illegal relation existing between Lowenburg and the bank. The bank had his money on deposit and he had a perfect right to demand that money or stop the payment of this illegal check, drawn on his funds in the bank of Klein. *Bernhard v. Taylor*, *supra*, is ample authority to support this proposition. 11 Rose's Notes (Revised Edition), pp. 214, 215, & 216, 3 L. R. A., 679, sec. 208; *Drinkall v. Movius State Bank*, (N. D.) 57 L. R. A. 341 and Notes.

4. Under the facts the maxim of *in pari delicto* did not obtain. Only an attempt had been made on the part of complainant to violate the law; but it is fair to say that had Klein complied with his agreement and delivered the whisky to complainant, the law would have been violated, but in all probability the courts would never have known

anything about the transaction. However, this was not done. Klein refused to deliver the liquor and attempted, and still is attempting, at the same time, to hold the check and collect the one thousand five hundred dollars without giving a penny worth of anything for it. The most unconscionable proposition, we submit, that could be brought before a court of justice; however as stated, the relation of *particeps criminis* between the two parties was never consummated, and the maxim of *in pari delicto* therefore, cannot apply, because the facts show that the complainant never occupied that relation in any particular to Klein. His effort now is to stop the payment of his check to Klein, or his assigns, and get his money back out of the bank where it was legally deposited.

5. The decision of the court while attempting to apply the rule of leaving the parties where they had put themselves, and refusing to grant relief to either, in this decree entirely abrogates the rule, for it in fact gave Klein all the relief he could possibly expect or hope for. It not only allowed him to hold the check and thereby give him the authority to present and collect it, but it also gave him damages in the sum of one hundred fifty dollars for the wrongful suing out of the injunction. Even if the rule applies which the court attempted to enforce, all it could have done under the law would be to deny the recovery and dismiss the case, and thereby leave the parties exactly where they were before the suit was brought. If Klein had any advantage by virtue of the transaction, under that view of the case he could retain it, but he had no right to anything more than that. The effect of the decree, we submit, is not only to aid Klein in stealing and collecting the check for one thousand five hundred dollars but is also to award him a premium of one hundred fifty dollars to aid and assist him in that purpose and design. Such a proceeding and its outcome cannot and will not be sanctioned by a court of conscience.

6. This proposition is simply a corollary of the 5th. That is, the court had no right to grant Klein an affirma-

tive decree by awarding him damages to the amount of one hundred fifty dollars or any other sum, for the wrongful suing out of the injunction, and thereby giving him the right of execution to collect the same. This, we submit, in any view of the case, was reversible error.

The case relied on by counsel in the court below was that of *Woodson v. Hopkins*, 85 Miss. 171. The court is doubtless well acquainted with this case, as it was one of some notoriety at the time it was decided. Judge WHITFIELD, of the supreme bench arose to the heights of his great and brilliant intellect and legal attainment when he delivered this opinion. The real decision in the case, however, is summed up in the syllabus, although the opinion is very lengthy. The syllabus is as follows:

"Equity. Jurisdiction. Fraudulent conduct. Illegal contracts. A lender of money at extortionate rates of interest under contracts which are void as against public policy, who establishes an agency for the carrying on of his nefarious business cannot maintain a suit in equity against one who was placed by him in charge of such business for an accounting where he must call in the aid, directly or indirectly, of the illegal contracts to make out his case. *Gilliam v. Brown*, 43 Miss. 641. Overruled."

We, therefore, ask the court to reverse the decision and grant a decree here perpetuating the injunction, cancelling the check, and giving appellant the right to go to the bank and get his money if he so desires.

*Brunini & Hirsch*, for appellee.

By sub-division four of appellant's brief, on page 13, appellant advances this proposition: "Under the facts the maxim of *in pari delicto* did not obtain. Only an attempt had been made on the part of complainant to violate the law . . . However, as stated, the relation of *particeps criminis* between the two parties was never consummated, and the maxim of *in pari delicto*, therefore, cannot apply, because the facts show that the complainant never occu-

pied that relation in any particular to Klein. His efforts now is to stop the payment of his check to Klein, or his assigns, and get his money back out of the bank where it was legally deposited.

We submit that appellant, by advancing the foregoing statement and argument, has entirely misapprehended the facts in the case, as well as the law applicable thereto. Lowenburg, according to the record in this case, bought and paid for the whisky. The crime was not only attempted, but it was consummated.

Was the "relation of *particeps criminis* between the two parties" consummated? Section 2103 of Hemingway's Code provides that if any person shall act as agent or assistant of either the seller or purchaser, in effecting the sale of any liquors, etc., he shall be guilty of misdemeanor, etc.

In one aspect of the facts in this case there was a violation of this section by appellant and appellee.

Section 2104, of the same code denounces a penalty against anyone who shall solicit orders for the sale of, or shall sell any liquors, the sale of which is unlawful under the provisions of the act, whether the liquor is to be delivered within or without the state, contemplating or permitting that the liquors shall be transported into the state. In one aspect of the facts in this case, this section was violated by the appellant and the appellee.

Section 2147 of the same Code makes it unlawful for any person, firm or corporation in this state, in person by letter, circular or otherwise, to solicit or take orders in the state for any of the liquors mentioned in section one of the act, and that the inhibition shall apply, whether the parties intend that the same shall be shipped in this state from outside of the state, or from one point in this state to another point in this state, and this is true whether the order be in writing or in parole, and whether the order is subject to the approval of some other person, and no part of the price is paid nor any part of the goods delivered when the order is taken.

So appellee, on his part, submits that the act was consummated; that the parties bore the relationship of "*particeps criminis*," that is, the appellant and appellee, and that the maxim of *in pari delicto* applies in full force and vigor, and the parties under the law and all the authorities, are left just where they were at the time of the commission of the act. The crime was complete and consummated, and no helping hand will be extended to appellant, under the law. The law will not aid him in getting his check back, any more that it would enable him in getting his money back.

With the consummation of the crime, and the payment of the actual money appellant cannot gainsay he would be without relief, but is he not in precisely the same position when he participates in the complete commission of the crime and the check is certified by the bank, in accordance with the understanding of appellant and appellee.

The certifying of a check is the equivalent of payment, the bank charging the account of the depositor with the amount of the check, and the check thereupon becoming an obligation of the bank.

"A certified check is a check drawn on a bank by a depositor, which is recognized and accepted by the proper officer of the bank as an appropriation of the amount specified therein to the payee named." *Security Bank v. National Bank of the Republic*, 67 N. Y. 458, 462, 23 Am. Rep. 129; *Clews v. Bank of New York Nat. Banking Ass'n*, 89 N. Y. 418, 421, 42 Am. Rep. 303; *Bank of British North America v. Merchant's Nat. Bank*, 91 N. Y. 106, 111.

The certifying of a check is equivalent to an acceptance of a bill of exchange payable on demand, whereby the sum so specified is immediately transferred from the drawer's account, thereby making the bank primarily liable to a *bona-fide* holder of the check for value. *State v. Miller*, 85 Pac. 81, 82, 47 Or. 562, 6 L. R. A. (N. S.) 365; *Chadwick v. United States*, 141 Fed. 225, 229, 72 C. C. A. 343; *United States v. Heinze*, 161 Fed. 425, 427; *Merchants*

*Bank v. State Nat. Bank*, 77 U. S. (10 Wall.) 604, 645, 19 L. Ed. 1008.

The principles laid down in the leading Mississippi case, *Woodson v. Hopkins*, 85 Miss. 171, are exhaustive, illuminating, and a complete answer to the contentions of appellant.

The same doctrine is admirably stated in 9 Cyc. of Law, 546. No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the ground-work of his claim. The rule is expressed in the maxim *ex dolo malo non oritur actio*? and in *in pari delicto potior est conditio defendentis*. The law, in short, will not aid either party to an illegal agreement; it leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, to give damages for a breach of it, or set it aside at the suit of the other, or when the agreement has been executed, in whole or in part, by the payment of money or the transfer of other property, lend its aid to recover it back. The test in all such cases is correctly stated in 15 Am. & Eng. Ency. of Law, 934.

The true doctrine was correctly put long ago in *Wooten v. Müller*, 7 Smed. & M. 386, and again in *Deans v. McLendon*, 30 Miss. 343, 9 Cyc. of Law, 563. To deprive a party of the right to repudiate an illegal contract and recover money paid thereon, it is not necessary that the illegal object should have been fully executed; it is sufficient if there has been a partial execution of such illegal object. 15 Am. & Eng. Ency. of Law, 1007. Section 610 of the Mississippi Code of 1906; *Baggett v. Beard*, 43 Miss. 120; *Freeman v. Lee County*, 66 Miss. 1; *Jamison v. Dulaney*, 74 Miss. 890; *Hinton v. Perry County*, 84 Miss. 536; *Vicksburg Waterworks Co. v. Vicksburg*, 99 Miss. 132; *New Orleans Railroad v. Martin*, 105 Miss. 230.

In conclusion we respectfully submit that under the facts, as revealed by this record, and the law applicable

thereto, appellant must be left where he found himself at the time of the suing out of the injunction herein, and that therefore the decree of the lower court should be affirmed.

W. H. Cook, J., delivered the opinion of the court.

Joseph Lowenburg exhibited his bill of complaint in the chancery court of Warren county against Joseph Klein and the People's Savings Bank & Loan Company, seeking to enjoin the presentation and payment of a certain check for the sum of one thousand five hundred dollars, and praying for the cancellation of the check. A preliminary injunction was issued, and upon the final hearing there was a decree dissolving the injunction and dismissing the bill and awarding the defendant Klein one hundred fifty dollars as attorney's fees, and from this decree the complainant prosecuted this appeal.

The bill of complaint filed by appellant charged that on the 16th day of December, 1919, he drew a check on the People's Savings Bank & Loan Company for the sum of one thousand five hundred dollars payable to himself, and that he indorsed the check in blank and delivered it to appellee Klein; that Klein presented the check to the bank and had the same certified; that the check was without legal consideration, and that he had received nothing of value therefor; that appellee Klein had refused to surrender the check or to give him any consideration for the same; and that unless restrained the check would be presented for payment and paid by the defendant bank. The bank filed no answer, but the defendant Klein answered the bill, denying the allegation thereof, and praying for the dissolution of the injunction and for statutory damages and solicitor's fees.

Upon the hearing of the cause, the complainant, Lowenburg, was the only witness introduced, and from his testimony it appears that about the time the near approach of national prohibition was disturbing the minds of so many

people the appellant became greatly agitated about his supply of liquors. One Gilbert, who operated a saloon at Delta, La., across the river from Vicksburg, maintained headquarters at the grocery store of defendant Klein, and appellant went to Klein's store to interview Gilbert, and he was informed that "Gilbert was over the river," and he thereupon opened negotiations with Klein for the purchase of a supply of liquors. Klein made him a price of one hundred dollars per case, but this price was not satisfactory and the deal was not closed. The following week negotiations were resumed, but Klein had then advanced the price to one hundred twenty dollars per case, and appellant still refused to pay the price. On the following Monday the supreme court of the United States sustained the validity of the National Prohibition Act (41 Stat. 305), and thereupon Klein advanced the price to one hundred fifty dollars per case. Appellant evidently concluded that further delay was dangerous, and thereupon he closed the trade for ten cases of whisky at one hundred fifty dollars per case, and gave Klein his check for one thousand five hundred dollars in payment therefor, and Klein promised that he would have the liquor delivered at appellant's residence the following night. It was agreed that the delivery would be made by a certain "fisherman" named Bennett, who operated along the river front, and who used in his business the significant cry, "Catfish for sale." Bennett was well known to appellant, and he appears to have been entirely satisfied with the arrangements. Night came on and the whisky was not delivered at appellant's residence and the long drouth still prevails in appellant's home. Upon receipt of the check Klein at once went to the bank and had the check certified, and has failed and refused to deliver the liquor or surrender the check; hence this suit.

The action of the learned chancellor in dissolving the injunction and dismissing the bill was correct. The transaction in which these parties were engaged was in violation of the positive statutory enactments and declared pub-

lic policy of both the national and state governments, and the courts will not lend their aid to either party. The possession of this liquor in the home of appellant would have been in violation of section 2, chapter 189, Acts of Mississippi legislature of 1918, and appellant had fully performed his part of this illegal agreement for the sale and delivery of the whisky, and, since the parties were *in pari delicto*, our courts will not entertain a suit for the relief of either against the other, but will leave them where they find them. 9 Cyc. 546; 15 Am. & Eng. Ency. Law, 997, 998, 999, 1001; *Wooten v. Miller*, 7 Smedes & M. 386; *Deans v. McLendon*, 30 Miss. 343; *McWilliams v. Phillips*, 51 Miss. 196; *Williams v. Simpson*, 70 Miss. 113, 11 So. 689; *Woodson v. Hopkins*, 85 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275.

In *McWilliams v. Phillips*, 51 Miss. 196, Judge SIMRALL, speaking for the court, said:

"All the parties participated in the violation of the law and are *in pari delicto*. In such cases the court will not, where the contract has been executed, interfere for the relief of either party; but will leave them in their respective conditions. Where a contract is executory, they will likewise refrain from lending aid to carry it into effect."

In the case of *Woodson v. Hopkins*, *supra*, in an able and exhaustive opinion, the authorities on this subject are collected and analyzed, and Chief Justice WHITFIELD, speaking for the court, there said:

"The true doctrine as to the inability of either party to a contract against public policy being permitted to invoke the aid of a court of law or equity is thus stated in the same authority (15 Am. & Eng. Ency. of Law, pp. 998, 999, 1001): 'Where illegal contracts are executed by the parties, then the same principle of public policy which leads courts to refuse to act when called upon to enforce them will prevent the court from acting to relieve either party from the consequence of the illegal transactions. In such cases the defense of illegality prevails, not as a protection to the defendant, but as a disability in the plain-

tiff.' The court does not give effect to the contract, but merely refuses its aid to undo what the parties have already done.' 'The fact that the party seeking to enforce executory provisions of an illegal contract, though they consist only of promises to pay money, has performed the contract on his part, and that, unless the other party is compelled to perform, he will derive a benefit therefrom, will not induce the court to enforce such provisions. Nor can the party performing, on his part, the provisions of an illegal contract, recover on the ground of an implied promise on the part of the party receiving the benefits therefrom to pay therefor, as the law will imply no promise to pay for benefits received under an illegal contract by reason of the performance thereof by the other party.'

"The same doctrine is admirably stated in 9 Cyc. of Law, 546: 'No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the ground-work of his claim. The rule is expressed in the maxim, "*Ex dolo malo non oritur actio*," and in "*In pari delicto potior est conditio defendentis*." The law, in short, will not aid either party to an illegal agreement; it leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the agreement has been executed, in whole or in part, by the payment of money or the transfer of other property, lend its aid to recover it back. The object of the rule refusing relief to either party to an illegal contract, where the contract is executed, is not to give validity to the transaction but to deprive the parties of all right to have either enforcement of, or relief from, the illegal agreement. While it may not always seem an honorable thing to do, yet a party to an illegal agreement is permitted to set up the illegality as a defense, even though it may be alleging his own turpitude. Money paid under an agree-

ment which is executed, whether as the consideration or in performance of the promise, cannot be recovered back where the parties are *in pari delicto*. And goods delivered or lands conveyed under an illegal agreement are subject to the same rule. Courts will not, even with the consent of the parties, enforce an illegal contract. And it would seem to follow that an illegal agreement cannot be rendered legal by ratification. An agreement void as against public policy cannot be rendered valid by invoking the doctrine of estoppel.' . . .

"The true doctrine was correctly put long ago in *Wooten v. Miller*, 7 Smed. & M. 386, the court saying: 'We have nothing to say in behalf of the morality of the transaction nor in favor of those who make the defense; but as they interpose the law as a shield, we cannot do less than say it covers and protects them.' And again in *Deans v. McLendon*, 30 Miss. 343, where the court said: 'Courts of justice, in the observance of these rules, are not influenced by any considerations of respect or tenderness for the party who insists upon the illegality of a contract, but exclusively by reasons of public policy. The object is to punish the active agent in the violation of a law by withholding from him the anticipated fruits of his illegal act, and thus, by deterring all persons from violating its mandates, to give sanctity to the law and security to the public.' And in *McWilliams v. Phillips*, 51 Miss. 196, where the court say: 'If both, however, concur in the illegal act and are in equal fault, the modern doctrine is that a court will not entertain the claim of either against the other to carry into effect the illegal contract.' And in *Williams v. Simpson*, 70 Miss. 115, 11 So. 689, we call special attention to the fact that in every one of these four Mississippi cases the contract was an executed one, the last one being the case of a merchant who merely failed to pay a sufficient privilege tax, and the one in 51 Miss. a case where a liquor dealer had simply failed to pay the required tax—cases where the acts were merely *mala prohibita*. . . .

"We declare the law in Mississippi now to be as it was stated to be in the four cases: *Hoover v. Pierce*, 26 Miss. 627; 30 Miss. 343; 51 Miss. 196; and 70 Miss. 113, 11 So. 689—viz.: That neither a court of law nor a court of equity, in this state, will entertain a suit for relief by either of two parties *in pari delicto* against the other, where the contract is against public policy. The plain truth is, on principle, that the contrary doctrine holds out a premium to those who violate the law, since, according to that doctrine, if they can only hurry fast enough to consummate their villainy, the law will help one to get from the other his part of the stolen plunder."

The doctrine of *locus poenitentiae* invoked by appellant cannot aid him under the facts of this case. Appellant has fully performed his part of the illegal contract, and has placed himself in a position where the courts will not relieve him. In 15 Am. & Eng. Ency. of Law, p. 1007, we find, in reference to this doctrine, the following statement:

"It seems, however, that the cases in which the principle that a party can avail himself of a *locus poenitentiae* to retrace his steps has been recognized to fall more properly under the principle that the courts will grant relief from illegal contracts where the party seeking relief was not *in pari delicto*.

"To deprive a party of the right to repudiate an illegal contract and recover money paid thereon, it is not necessary that the illegal object should have been fully executed; it is sufficient if there has been a partial execution of such illegal object."

In the application of the doctrine that the courts will not in any way lend their aid to either of the parties to an illegal agreement, we have reached the conclusion that the allowance of attorney's fees to the defendant was erroneous. It is the contention of appellee that the right to attorney's fees upon the dissolution of an injunction is statutory, and that this right is in no wise dependent upon the legality or illegality of the transaction upon which the

suit is based. This distinction is entirely too refined. It is true that the right to damages and attorney's fees upon the dissolution of an injunction is statutory, but when an illegal agreement underlies and is the basis of the entire litigation, and the parties are *in pari delicto*, the courts will not lend their aid to the enforcement of this right, and will not aid the defendant in securing the sinews of war to fight the legal battles which are thrust upon him on account of his participation in an illegal agreement, but will leave them in their respective positions.

The decree of the court below in so far as it awards appellees attorney's fees will therefore be reversed; otherwise the decree is affirmed.

*Affirmed in part, and reversed in part.*

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FREEDMAN'S AID & SOUTHERN EDUCATION SOC. v. SCOTT  
*et al.*

[87 South. 659. No. 21322.]

CHARITIES. *Bill held to show complainant had no right to enforce alleged trust.*

Where a bill in chancery to enforce an alleged trust shows that the trust, if any exist, is for the benefit of a named school, and is not brought in the name of the school, or by its trustees, but by parties living in the community who made some contributions to a fund to buy the alleged trust property for the use of the school, there is no such right in the complainant as will warrant equity in taking cognizance of the suit and rendering a decree, and where such bill is demurred to the demurrer ought to be sustained.

APPEAL from chancery court of Webster county.

HON. A. J. MCINTYRE, Chancellor.

Suit by W. R. Scott and others against the Freedman's Aid & Southern Education Society. Decree for complainants, and defendant appeals. Reversed and dismissed.

*McKeigney & Latham*, for appellant.

In this, our reply brief, we respectfully submit that if the alleged trust were such as could be enforced in a court of equity, the amended bill in this case is insufficient, because on the allegations of the bill and the exhibits thereto it appears that the donors were attempting to create a trust for the benefit of Woodland Academy, and we respectfully submit that Woodland Academy is not complaining. The complainants do not present a case by their amended bill of which a court of equity has cognizance.

Counsel for appellees, says that "all the authorities that I have been able to find are uniform in holding that in all proceedings for the enforcement of a charitable trust the same definiteness and certainty of interest is not required to be shown or alleged in order that the complainants shall have the right to maintain their suit as in other classes of trusts. We may concede the position taken as sound law, yet it does not answer position of appellant. Nor does it relieve the complainants of the burden of showing a definitely defined trust which they have a right to enforce in a court of equity. If the purpose of the alleged trust is not clear, certain and definite, then a court of equity cannot enforce or administer it.

Does the amended bill present the case of a trust the terms of which are clear, certain and definite, Complainants in their bill plant themselves upon three several deeds of doubtful meaning. The only intimation of trust is the dubious language "in trust for the use and benefit of Woodland Academy as the Society by its proper officers may deem best," meaning the appellee, as same appears in deed of W. F. Mallalieu exhibited to the bill, and similar expressions in the other deeds exhibited to the bill. There are no directions in either or any of these instruments as to how the land was to be used, this being left entirely in the discretion of appellant, the grantee in these deeds.

The declaration of trust, we respectfully submit, is too indefinite and uncertain for equitable cognizance. *Fineld*

v. *Van Wyck*, 94 Va. 557, 64 Am. St. Rep. 745, and editorial notes thereto.

We re-iterate the point made in our original brief that the amended bill seeks to require appellant to use the land for the purpose of producing revenue to maintain such school as Woodland Academy was, but states no facts tending to show how the land was to be used in contemplation of the parties to produce revenue. And we respectfully submit that the deeds are silent.

Although the bill seeks to require the maintenance of such school as Woodland Academy was, there is nothing in the record, either of allegation or evidence, to show the character, nature or grade of the once was Woodland Academy. It is all vague, doubtful, indefinite and uncertain.

No trust of sufficient certainty and definiteness is shown for the enforcement and performance of which appellees may proceed in equity. To this proposition we respectfully cite the case and notes mentioned above. On the facts, there is no proof in the record that any such entity, either corporate or unincorporated or otherwise as Woodland Academy was in existence when the bill was filed or at the time the Woman's Home Missionary Society, the lessee, of appellant, moved from the premises.

Woodland Academy seems long since to have vanished. Counsel for appellee suggests that a casual reading of the record will disclose the fallacy "of the contention made in our original brief that the evidence fails to prove the allegations of the amended bill," but we believe that a critical reading of the record will disclose the failure of proof.

*T. W. Scott*, for appellee.

Answering first the contention that appellees have no interest in the property that will entitle them to maintain this suit, the allegations of the amended bill, the evidence in the case and the finding of facts by the chancellor show conclusively that this is trust property, nor is this fact seriously controverted by the appellant, and it is also al-

leged in the amended bill and shown by the evidence and findings of fact by the court that it is a trust established for charitable purposes. All the authorities that I have been able to find are uniform in holding that in all proceedings for the enforcement of a charitable trust the same definiteness and certainty of interest is not required to be shown or alleged in order that the complainants shall have the right to maintain their suit as in other classes of trust. But, on the other hand, it seems to be almost universally held that even a remote interest in the creation of or the benefits to be derived from the trust will entitle the complainants to maintain their suit. And especially is this true where the suit is brought for the purpose of requiring the trustee to execute the trust. 22 Encyclopedia of Pleading and Practice, p. 203. The case of *Lowry v. Francis*, 2 Yerg. (Tenn.) 534, cited in a note in the same Vol. 22, seems to be a case almost identical with the case at bar. It is there held that some of the inhabitants of a township may sue in equity on behalf of all to prevent a diversion of school funds held in trust.

The bill in the case at bar alleges that this was a fund created by popular subscription and placed in trust in the hands of appellant as trustee for the purpose of maintaining a school on the land in controversy for the benefit of those residing near the same and any others who desired to attend, and I contend that the complainants or any one of them would have had the right to maintain this suit on the ground, as alleged in the amended bill, that they lived in the community and are interested in and would receive the benefit of the operation of such a school as was contemplated when this trust estate was created, even had they not been contributors to the fund as alleged in said amended bill.

The bill clearly and definitely alleges that this land was purchased with a fund to which appellees were contributors. I do not think there is any merit in the contention that the demurrer should have been sustained on the ground that this is not such an interest as would entitle

125 Miss.]

Opinion of the Court.

appellee to maintain this suit, because practically every authority that I have been able to find holds that the donor or creator of the charity has the right to maintain a suit to enforce its proper execution. 22 Ency. Pl. & Pr., chapter on Trusts and Trustees.

ETHRIDGE, J., delivered the opinion of the court.

W. R. Scott, Dr. J. K. Crowder, and J. B. Scott, as individuals, and W. R. Scott, Dr. J. K. Crowder, and George Johnson, as trustees of Pine Chapel Methodist Episcopal Church, filed a bill in the chancery court against the Freedman's Aid & Southern Education Society, a corporation under the laws of the state of Ohio, alleging that prior to the 29th day of March, 1890, there was located on lands described in the bill at Clarkson, Webster county, Miss., an unincorporated school known as the "Woodland Academy," run and operated under the auspices of the Methodist Episcopal Church: that said school was operated for the benefit of and was patronized by the people living near the same; that people living near the said school together with the officers and societies of the Methodist Episcopal Church, desiring to place the said school on a more permanent basis and give it a source of income, made voluntary contributions for the purpose of buying the land to give the school a more permanent source of income; that the complainants George Johnson and J. B. Scott contributed to said fund, and Rev. Levi Crowder, the father of Dr. J. K. Crowder, contributed to the fund, and the said George Johnson lived near the said land and was a patron of the said Woodland Academy, and is now entitled to have the revenue from said land used for the purpose of maintaining a school thereon; that Pine Chapel Methodist Episcopal Church, through its trustees, was a contributor to the said fund, and that Dr. J. K. Crowder and W. R. Scott are now trustees of the said church; that said fund was placed in the hands of W. F. Mallalieu, a bishop of the Methodist Episcopal Church, for the purpose of purchasing the said land; that said W. F. Mallalieu

purchased and conveyed to the said defendant in trust for the use and benefit of said Woodland Academy certain lands specifically described in the bill, a copy of the said deed being made an exhibit to the said bill and hereafter referred to; that he also, with some of the fund contributed, purchased and had conveyed to the defendant by L. D. Yates certain described lands, and that the trustees of Pine Chapel Methodist Episcopal Church conveyed to the defendant on April 28, 1890, in trust for the Woodland Academy, ten acres of land also described in the bill; that, in pursuance of the terms and conditions of the said trust deeds, and said Woodland Academy was operated and maintained for the use of children living near the same until November 2, 1899, on which date the defendant executed a lease to the Woman's Home Missionary Society of the Methodist Episcopal Church, also an Ohio corporation, to the said school and land for a term of ninety-nine years on condition that the said Woman's Home Missionary Society would maintain a school on said land for the instruction of youth, and that said lease would be void if said Woman's Home Missionary Society should fail for the space of one year to keep on said premises an academy or school for the instruction of youth; that said Woman's Home Missionary Society, in pursuance of said lease, conducted a school known as the "Bennett Academy" on said land until May, 1914, when it abandoned the said premises, and has not since attempted to maintain a school; that after the expiration of one year from said abandonment said lease became void, and that it became the duty of the defendant, as the trustee of said property, to take possession of said land and use the revenues therefrom for the purpose of maintaining a school thereon, and that the complainants, as patrons of the said school, and as contributors to said fund, are entitled to have the revenue of said lands used for the maintenance of a school thereon; that the defendant has failed and refused to carry out the terms and conditions of the trust deeds, and has refused to use the revenues from said lands to maintain a school

thereon, but is undertaking to divert said trust estate to other and different purposes.

It is further alleged that the land is valuable, and, if used in a businesslike way, that the revenue therefrom would go far towards the maintenance of a school, that there is located on said land a good two-story school building and other buildings that could be used for the maintenance of said schools, and the bill prayed for a decree requiring the defendant to use said lands so as to produce the greatest amount of revenue therefrom, and to use said revenue for the maintenance of the school to which the complainants may send their children according to the terms and conditions of the said trust, and according to the intention and purposes of the contributors to said fund from which said estate was created; and, in case of failure or refusal to comply with said decree, that the defendant be removed as trustee, and that the court should appoint other trustees for the purpose of carrying out the said trust.

The deeds made exhibit to the bill contain the following expressions which are relied on for the trust features involved in the bill:

"Do hereby convey to the Freedman's Aid & Southern Educational Society of the Methodist Episcopal Church [describing the property] in trust, for the use and benefit of Woodland Academy as the society by its proper officers may deem best."

The contract of lease between the defendant and the Woman's Home Missionary Society of the Methodist Episcopal Church, a corporation under the laws of the state of Ohio, leased the land described and provided that the lessees shall pay rent, taxes, and assessments and not suffer any waste, and shall perpetually maintain on said premises an academy or school for the instruction of youth, etc. It is then provided as follows:

"That if said rent and any taxes and assessments that may be levied upon said premises, or upon any part thereof, shall remain unpaid for one year after the same shall

become due, and without demand made therefor, or if said lessee shall abandon said premises, or any part thereof, or if said lessee's interest therein shall be sold under execution, or any other legal process, without the written consent of said lessor, its successors or assigns, or if said lessee shall fail for the space of one year to keep on said premises an academy or school for the instruction of youth, or if said lessee shall fail to keep any of its covenants and agreements in this lease contained, then and in such case it shall be lawful for said lessor, its successors and assigns, into said premises to re-enter, and the same to have again, repossess, and enjoy, as in its first and former estate; and thereupon this lease and everything herein contained on the said lessor's behalf to be done and performed shall cease, determine, and be utterly void."

A demurrer was interposed to this bill setting forth numerous grounds, among which are: That there is no equity in the bill; that complainants do not show how they are interested in the subject-matter of this suit; that the complainants fail to show that they have any interest in the subject-matter of this suit which a court of equity can enforce or protect; that it appears on the face of the bill that complainants are not proper parties to the bill; that the bill does not allege that the defendant has breached any contract made by it with the complainants; that no one is complaining in this suit who has any legal or equitable right to complain; that it is not shown that the complainants were parties to the lease between the Woman's Home Missionary Society and the defendant; that the bill shows on its face that the defendant is authorized to use the lands mentioned as defendant as its proper officers might deem best. This demurrer was overruled, and an answer was filed and evidence taken.

It appears from the evidence on the trial that some of the complainants contributed five dollars, which was turned over to W. F. Mallalieu, and it was shown that some parties in the community helped cut lumber and do the work of building the schoolhouse. It was further shown

in the evidence that the purpose in making the deeds was to induce the defendant to finance the school, and that it did conduct a school for a period of about nine years, when it leased the premises as above stated.

Neither Yates nor his heirs were made parties to the suit either complainant or defendant; neither were Mal-lalieu or his heirs made parties complainant or defendant; neither is the Woman's Home Missionary Society made a party to the suit, but the evidence shows that this organization moved its school from Clarkson, Miss., to Mathis-ton, Miss., and moved one of the school buildings to that point, where it is conducting a school.

It will be noted from the statement that the bill and the deeds called trust deeds do not show any particular thing that was to be done by the defendant in operating the school. The trust is made to an unincorporated school. If such school is a legal entity at all it must be so because it has trustees who represent it. If there is any trust it is for the benefit of this school, and the instrument relied on nowhere imposes any obligation on the school to receive the complainants or their children as students therein. If there is no specific trust involved in the deeds, which there is not, and if there is no person or legal entity representing a person existing for whose benefit the land was conveyed, there could be no trust, because the law requires a trust of this kind to be in writing. If there is any trust at all, it must be a trust for the benefit of the trustees of the Woodland Academy.

In our opinion the demurrer to the bill should have been sustained. The bill states no right of action in the complainants and does not make a case warranting the interference of a court in their behalf. The allegations of the bill are wholly insufficient to create any right in the complainants, and it was error for the court to enter a decree in their behalf.

*Reversed and dismissed.*

## TALLAHALA LUMBER Co. v. HOLLIMAN.

[87 South. 661. No. 21614.]

1. MASTER AND SERVANT. *Relation not served by employee's act in attempting to board moving train.*

Where a lumber company was transporting its employees on its train from their work in the woods to the camp, and an employee who was a member of the track crew was called from the train by a signal given by his foreman after the train had stopped on account of some defect in the locomotive, and the employee interpreted this signal to mean that track work was necessary to be done ahead, and then left the train and followed his foreman down the track to a point at or near the front of the locomotive, and the train then started forward toward the camp, and the employee attempted to board the train as it passed him and was injured, *held*, that the act of the employee in endeavoring to board the moving train, where he had a right to ride, was not an abandonment of the master's business and did not sever the relation of master and servant.

2. MASTER AND SERVANT. *Master's knowledge of defective car step held for jury.*

Where a lumber company undertook to transport its employees on its trains to and from their work in the woods, and one of the steps of a car which was furnished for that purpose was twisted or bent, and there was evidence that the company did not maintain any system of inspection of such cars while in use in the woods, under the facts in evidence, it was a question for the jury as to whether the defendant knew, or by the exercise of reasonable care and diligence could have known, of the defect in the step.

3. MASTER AND SERVANT. *Negligence as to employee boarding car with defective step and his contributory negligence held for jury.*

Under Acts 1910, chapter 135 (Hemingway's Code, Section 502 and 503,) providing that contributory negligence shall not bar a recovery, when the step of a flat car, which has been furnished by the defendant company for the purpose of transporting its employees to and from their work, was twisted or bent, and an employee was injured in attempting to use this bent step in

boarding the train while moving, *held*, that, under the facts in evidence, it was a question for the jury as to whether, in furnishing a car with a defective step, the defendant was guilty of negligence which contributed to the injury, and that all questions of negligence and contributory negligence were properly submitted to the jury.

- 4 NEGLIGENCE. *Employee boarding moving train held guilty of contributory negligence requiring diminution of damages.*

Under the concurrent negligence statute (Laws 1910, chapter 135), providing that damages shall be diminished in proportion to the amount of negligence attributable to the person injured, where an employee suffered the loss of a leg by reason of an attempt to board a moving train, *held*, that, under the facts in evidence, the plaintiff was guilty of contributory negligence, and that a verdict for eighteen thousand dollars was excessive.

APPEAL from circuit court of Forrest county.

HON. R. S. HALL, Judge.

Action by Andrew Holliman against the Tallahala Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed conditionally.

*T. Brady*, for appellant.

The instruction which the appellant asked the court to give; namely, that it was under no duty to furnish a safe step to appellee to assist him in jumping on appellant's moving train, but was under the duty only to furnish him with a safe step to get on appellant's train when it was not in motion, should have been given under the contention of appellee that he was a passenger. In answer to this contention, which is about as strong as that of any other mentioned in appellee's brief, appellant directs the attention of the court to the fact that appellee left appellant's train in obedience to an order of his superior. He could not, therefore, have been a passenger in the sense of the word or term contended by appellee. He was nothing more than an employe and he was behaving as an employe when he left appellant's train in obedience to the orders of his superior. He was also disobeying the orders of his

superior when he jumped on appellant's train when it was moving, because the testimony shows, and appellant here challenges the record on the point, that the signal for the train's starting to the camp was the ringing of the bell and two blasts of the whistle. Appellee earnestly contends that because he was a passenger he is entitled to recover, but for fear that this contention will not be sustained by the court, he also contends that if he were not a passenger, then he was not acting beyond the scope of his duties because other persons jumped on appellant's train while it was moving. In other words, appellee admits that he jumped on the train after he was directed to leave the train and follow his superior officer, but he says because other employees did likewise, that, therefore, he was justified in so doing and is accordingly entitled to recover. He admits practically that he was acting beyond the scope of his duties and contends that because others were negligent, that he, likewise, had a right to be negligent and that his negligence does not bar his right to recovery because the step of appellant's car was twisted. Ordinarily this would be true, if he were acting within the scope of his duties, but it is not true that appellee is entitled to recover, when he was not so acting because, before the negligence of the appellant can be applied so as to entitle him to recover, he must have been acting within the scope of his duties and about his master's business. This he was not doing. He expressly states that he was directed to leave the train by his superior and that he was not directed by anyone to get aboard the train and that nothing was done indicating to him that he should attempt to get aboard to continue his journey to his destination.

Second. Appellee takes issue on the fact as disclosed by the record with the contention made by appellant that it was not shown that it knew, or by the exercise of reasonable care and diligence could have known of the alleged defect in the stirrup or step.

Appellant directs the attention of the court to the fact that the appellee was an employee of the appellant and that under the Hope case and all other cases touching the question decided by the supreme court of this state, it is necessary for appellee to show either that the defect in the step existed at the time it was furnished by the master or, in the event it became defective after it was so furnished, that the defect had been in existence for a length of time sufficient to have afforded the master, in the exercise of reasonable diligence, an opportunity to inspect it. The record in this case discloses that the cars used by appellant were inspected by an inspector of the Gulf & Ship Island Railroad Company before they were delivered by that company to it at Hattiesburg, Mississippi. The Gulf & Ship Island Railroad Company furnished an Inspector who lived at Hattiesburg, who did inspect cars.

Appellant was not under obligation to its employees to inspect its car steps every hour of the day. Its method of inspection, as disclosed by the record, was a reasonable one and the duty, therefore, devolved upon the appellant to show that the appellant knew or by the exercise of reasonable care and diligence could have known of the alleged defect in the step or stirrup. This it wholly failed to do and, therefore, under the decisions of the supreme court of this state, this case should be reversed. See *Hope v. N. C. & M. R. R. Co.*, 98 Miss. 882; *M. C. R. R. Company v. Bennett*, 71 So. 310; *Ten Mile Lbr. Co. v. Garner*, 78 So. 776.

Third. Appellant admits that he jumped on appellant's train while it was in motion and therefore made an improper use of the step but he contends that such a use of the step does not deprive him of the right of recovery because the train was not moving rapidly and that it was a custom for the appellant to slow its train down to let its employees get on board its train. Appellant takes square issue with the appellee in this contention.

Appellant especially directs the attention of the court to the fact that the custom of the appellant was not to

slow its trains down to enable its employees to jump on board moving trains. It is abundantly shown by the record that this is not the case, for it had a signal before it started which indicated to its employees that this train was going to the camps and that signal was the ringing of the bell and two blasts of the whistle. The record also discloses the fact fully and completely that appellant's train stopped for the purpose of allowing its employees to get on its cars.

Appellant contends, in spite of the statute requiring all questions of negligence to go to the jury, that this case should have gone to the jury because the bent or twisted step was not the proximate cause of appellee's injury; his injury was caused by the improper use of the step, which might have been used safely had it been properly used. Appellee was not a train employee, his duties did not require him to jump on a moving train and his act in doing so was an improper use of the step. Appellant does not contend, as appellee seems to think, that all questions of negligence in instances where both plaintiff and defendant are guilty of negligence proximately causing the injury must not go to the jury, but appellant does seriously and earnestly contend that negligence may exist on the part of the defendant, upon which the jury is not entitled to pass. The negligence which must go to the jury in all instances is a proximate negligence and one having some relation to the injury.

In conclusion, appellant reiterates that this case should be reversed for the four reasons hereinabove alleged and particularly on account of the argument made by appellee's attorney and on account of the fact that appellee was acting beyond the scope of his duties when he sustained the injury, on account of which he sues. See 4 Labatt on Master and Servant, sec. 1565; 4 Labatt on Master and Servant, sec. 1554, 4667. Also the following cases: *Kentucky Lbr. Co. v. I. B. Nichols*, 51 L. R. A. (N. S.) 1213; also 10 L. R. A. (N. S.), page 367; 27 L. R. A. (Note), page 161; *Chicago, B. & V. Q. R. R. Co.*

v. *Epperson*, 27 Ill. App. 79; *N. Y. T. & M. R. R. Co. Sutherland*, 3 Wilson Civ. Cas. (Tex.) 177; *Raynor v. Mitchell*, 2 C. P. Div. 357, 25 Week. Rep. 633; *N. O., etc., R. R. Co. v. Harrison*, 48 Miss. 112; *Burke v. Shaw*, 48 Miss. 445; *Fairchild v. N. O., etc., R. R. Co.*, 60 Miss. 631; *Louisville, etc., R. R. Co. v. Douglass*, 69 Miss. 723; *Illinois, etc., R. R. Co. v. Latham*, 72 Miss. 32; *Garner v. Viosca*, 8 Rob. 150; *Ryer v. Railey*, 28 La. Ann. 64; *Conniff v. Railway Co.*, 42 La. Ann. 477; *Odom v. Schmidt*, 52 La. Ann. 2120; S. C. 28 So. 350; *Weber v. Lockman* (Nebr.), 60 L. R. A. 313; *Dorsey v. Pittsburg, etc., R. R. Co.*, 104 La. Ann. 478; S. C. 52 L. R. A. 92; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87; S. C. 3 So. 631.

In spite of all the contentions of appellee, it is hardly thinkable that the time has come when a small corporation like that of the appellant forced to rent rather than own cars will be required to pay the sum of eighteen thousand dollars, to the appellee, on account of the loss of his leg caused by jumping on its rapidly moving train, under a judgment rendered by a jury misled both by arguments of counsel and the erroneous announcement of the law as contained in the instruction of the court in this case. Appellant earnestly insists that this case should be reversed.

*N. T. Currie*, for appellee.

The first contention for reversal made by the appellant is that the appellee was not engaged in and about the master's business but was acting beyond the scope of his duties when he sustained the injury on account of which he sued and the judgment was rendered. In reply to this contention we assert that, as is shown by the record, the appellant admits its well established custom and system of work and operation to furnish special trains on which to transport and on which it did transport its employees to and from their work and the proof shows that these trains carried no logs or other loads, but employees only.

The appellant admits and the testimony shows that the train and car on which the appellee was injured was the train and car furnished by the appellant that evening on which to transport the appellee and other employees from their places of work to the camp. It admits that the appellee rightfully got on this train according to appellant's custom and at its invitation and request and started from his place of work to the camp. The proof shows that the appellee got on the train then and there furnished by the appellant to ride thereon from said place to the camp. The proof shows that the train was defective in two particulars.

(A) The injector on the boiler would not work, and,

(B) The step or stirrup on one of the cars was bent and twisted.

The proof shows that the train was stopped on the route to the camp not because of any sort of fault, default, negligence, or wrong of the appellee but because of the defective injector. The proof shows that when the train stopped, Nix, the appellee's foreman, who was riding up toward the front of the train, got off and signaled and that the appellee got off of the train in response to this signal which he interpreted to mean to get off of the train and go to some work on the track just ahead of the engine, track work being the kind of work he was hired to do, and immediately after he got off in response to this signal, the train started to moving slowly on toward the camp. When it passed the place on the track where the appellee thought the work was to be done he saw there was nothing wrong with the track and the train kept moving and the appellee, seeing the other men who had gotten off of the train getting back on it as fast as they could and believing that the train was pulling out for the camp, he undertook to get back upon the train and while so doing was injured. The train at that time was moving very slowly, at the rate of only four or five miles per hour.

Now, the appellant seeks to have this court hold under the facts and circumstances that the relation of master

and servant did not exist between the appellant and the appellee at the time the appellee undertook to get back upon the train. The appellant contends that the act of the appellee in getting off of the train and undertaking to get back upon it under the facts and circumstances disclosed by the record for the purpose of continuing his journey thereon to the camp, the place of his destination, without orders so to do, severed the relation of master and servant between him and the appellant.

Not only have the courts held that the relation of master and servant, or employer and employee exists under such facts and circumstances, but many of them have held, and we think with great reason, that the relation of carrier and passenger exists, and we cite the following authorities: *Tanner v. Hitch et al.*, 53 S. E. 287; *Southern Railroad Co. v. West*, 62 So. 141; *Simmons v. Oregon Railroad Company*, 69 Pac. 440.

This court has never held so far as we are advised that the relation of carrier and passenger exists under the facts and circumstances of this case, but it has recognized the relation of master and servant in such cases. Reply to 2nd Assignment of Error.

The second ground for reversal urged by the appellant is that it was not shown that the appellant knew or by the exercise of reasonable care and diligence could have known of the alleged defect in the step or stirrup. The answer to this contention is that the car was furnished to the appellee on which to ride, or putting it another way, with or on which to work, in a defective condition. The testimony in the case, particularly that of J. P. Runnels, from which we have quoted herein, shows without dispute and conclusively that the step or stirrup on the car on which the appellee was injured was bent and twisted when it was furnished and the appellee and other employees invited and required to ride upon it, and before it had ever turned a wheel on the trip to the camp.

The appellee was not a member of the logging crew. He had nothing to do with the cutting, loading or hauling of

logs. He was not a member of the train crew. He had nothing to do with operating the train. He had no connection whatever with any of those matters and no occasion to use, work with, be upon or about the trains or cars except when riding on the same to and from his place of work. It is therefore plain, as to him, that the car was not an instrumentality furnished him until it was placed in the train on which he was to ride and he was invited or required to use it in riding from his place of work to the camp that evening. A contrary contention would be unreasonable, untenable and preposterous.

If the car was defective when the appellant furnished it to the appellee, and the testimony in the case shows conclusively that it was, and if the appellee was injured, and the testimony shows conclusively that he was, and if he sustained his injury in whole or in part because of the defective condition of the car at the time it was furnished, and the testimony in the case shows conclusively that he did, then, under the law there is no escape from liability for the appellant. All of these questions of fact were properly and correctly submitted to the jury and the jury found all of them in favor of the appellee.

Counsel for the appellant cites the case of *Alabama & V. Railroad Company v. White*, 63 So. 345, as an authority in support of their contention on this point. We conceive this case to be an authority directly against the contention of the appellant and directly in support of the contention of the appellee.

In the case at bar the proof shows conclusively that the step on the car was bent and twisted when the car was put in the train, and furnished to the appellee on which to ride from his place of work to the camp.

When a servant is injured by reason of a defect in a tool or appliance furnished him by the master it is necessary for him to show either that the defect in the link existed at the time it was furnished by the master or in the event it became defective after it was furnished that the defect had been in existence for a length of time sufficient

to have afforded the master in the exercise of reasonable diligence, and opportunity to inspect it.

We also conceive this case to be an authority directly against the contention of the appellant and directly in support of the contention of the appellee, and we adopt it as an authority in support of our contention that the appellant is liable in this case because the proof is conclusive that the step on the car was bent and twisted at the time it was furnished to the appellee by the appellant. The language of the court in part and on the point at issue is: "That the defect in the link existed at the time it was furnished by the master."

The law is settled in this state and in all jurisdiction of which we have any knowledge that if the master furnishes the servant an appliance in a defective condition and because of the defects the servant is injured, then the master is liable. *Simmons v. Oregon Railroad Co.*, 69 Pac. 440; *Southern Railroad Co. v. West*, 62 S. E. 141.

But counsel for the appellant, it seems, make the indefinite contention that the car was furnished by the Gulf & Ship Island Railroad Company to the appellee on which to ride to and from his place of work at the time it was delivered by the railroad Company to the appellant, and by substituting, for the purpose of this lawsuit, the Gulf & Ship Island Railroad Company as an employer and as master of the appellee instead of itself. This is not true as a matter of fact nor can it be true as a matter of legal fiction for the whole thing is that the appellant was the employer and master of the appellee and furnished the car so far as the appellee is concerned.

In the case of *Citizens Light, Heat & Power Company v. Kendric*, 60 So. 526, it was held that an employer could not escape liability for injuries to an employee from the breaking down of a wagon on which he was riding by showing that the wagon belonged to a third party from whom the employer hired it.

It would be preposterous to say that the appellant had, under the facts and circumstances proved by this record,

exercised reasonable care in furnishing a safe car on which to ride from his place of work to the camp or that appellant had a right to rely upon inspections made by the Gulf & Ship Island Railroad Company from which it received the cars, even if the record in the case showed that the Gulf & Ship Island Railroad Company did inspect them which it does not; that the appellant itself owed no duty to the appellee to make any sort of an inspection of the car before it furnished it to him. In support of this contention we cite the case of *Buckley v. Jones*, 79 Miss. 1, 29 So. 1000.

Finally upon this point we submit that it was a question of fact to be determined by the jury whether or not the appellant exercised reasonable care and diligence to furnish the appellee and its other employees a safe, suitable and fit car on which to ride from their places of work to the camp, upon the occasion of the injury to the appellee, and the jury determined that issue against the appellant.

Reply to third assignment of error. The third ground for reversal urged by the appellant is that the proximate cause of the appellee's injury was his gross negligent act in making an improper use of the step of the car by jumping on the same while it was in rapid motion.

Of course this contention of the appellant cannot be sustained and we would answer it merely with the citation of the statute of the state of Mississippi abolishing contributory negligence as a defense in bar to an action for the recovery of damages, for personal injuries, were it not for the fact that it is urged by appellant that the judgment is excessive and ought to be reduced because of what is termed by counsel for the appellant in their brief the gross negligence of the appellee.

The first time the statute abolishing contributory negligence as a defense in bar came under review in this court was in the case of *Natchez & Southern Railroad Company v. Crawford*, 99 Miss. 697, 55 So. 596, and in the course of its opinion the courts said: "The question whether,

under this statute, if the plaintiff's injury were brought about by his own wilfulness, recklessness, or gross negligence, it would defeat a recovery by him, notwithstanding the negligence of the defendant, is not presented for decision." In other words the court reserved its decision on this point, it being unnecessary to decision of that case.

But in the case of *Yazoo & Mississippi Valley Railroad Company v. Carroll, et al.*, which is reported in 103 Mississippi, 820, 60 So. 1013, this exact and precise question was presented to the court when it was called upon to pass upon the refusal of the lower court to grant an instruction presenting the question to the jury, and in its opinion in that case the court said:

"The point we are now called upon to decide was expressly reserved in *Railroad Companies v. Crawford*, 99 Miss. 697, 55 So. 596. This statute is plain, unambiguous and easily construed; prior to its passage any contributory negligence, slight, ordinary or gross, if negligence can in fact be so classified, barred a recovery and the manifest legislative purpose in enacting it was simply to alter the rule on this subject which had been established by the courts, so that such negligence should not thereafter bar recovery, but should simply cause a diminution of the amount thereof. This statute does not deal with, and was not intended to introduce into our jurisprudence, degrees of contributory negligence, but it deals with contributory negligence proper of every character.

The same question was again presented and passed upon in the case of *Mississippi Central Railroad Company v. Robinson*, 106 Miss. 896, 64 So. 833, and in its decision in that case the court cited, approved, and followed the Carroll case. *Yazoo & Mississippi Valley Railroad Co. v. Williams*, 74 So. 835; *Yazoo & Mississippi Valley Railroad Company v. Williams*, decided by this court on April 23, 1917, and reported in Volume 74 at page 835 of the Southern Reporter.

We submit that the verdict and judgment is not excessive. The appellee was a boy eighteen years of age.

He was a bright, handsome, healthy, vigorous looking country boy of very splendid physique and well proportioned and the only defect apparently about him from the crown of his head to the sole of his one foot was the loss of his left foot and a part of his leg.

W. H. COOK delivered the opinion of the court.

This action is by Andrew Holliman, a minor, through his next friend, against the Tallahala Lumber Company, appellant, for damages for personal injuries alleged to have been sustained by him while in the employ of appellant lumber company, and from a judgment in favor of plaintiff for eighteen thousand dollars the Lumber Company prosecuted this appeal.

The facts in this record, in so far as they are material to the decision of this case, are substantially as follows. The sawmill of appellant is located at Ora, on the Gulf & Ship Island Railroad, about thirty miles north of Hattiesburg, Miss., while the timber of appellant which it was then engaged in cutting and transporting to the mill at Ora was located east of Hattiesburg, in Perry county. In order to reach this timber appellant constructed a logging railroad leaving the main line of the Gulf & Ship Island Railroad at Hattiesburg and extending to or near Runnelstown, in Perry county, a distance of about twelve or thirteen miles. At or near Runnelstown appellant established a camp and constructed homes and boarding facilities for its employees. It also constructed spur or lateral tracks extending from its main line out through its timber. One of these spur tracks extended from the camp into the woods a distance of about fifteen miles, and it was the custom of appellant to transport its employees who resided at and near the camp, to and from their work and for this purpose it used a shay engine and logging or flat cars. Appellant did not own the cars which it used in its woods and for transporting the logs, but secured them by contract from the Gulf & Ship Island Railroad.

Company. On each side of these cars there were two metal stirrups or steps, with a rod or handhold above each step, for the use of the employees in boarding the cars. These steps extended some distance below the bottom of the cars, and in the process of loading and unloading the cars with logs these steps were frequently twisted and bent. There was no conductor on the train which was used in transporting the employees to and from the camp, but this train was in the sole charge of the engineer who operated it. It appears that this engineer selected the cars for that purpose from such cars as he found on the side tracks.

Appellee, a boy about eighteen years of age, was employed by appellant as a member of the track crew, and on the afternoon that he was injured appellant's train, which consisted of an engine and two flat cars, was making its regular trip from the woods to the camp. Appellee, together with about one hundred other employees, was aboard, and after the train had proceeded some miles on the trip to the camp, some defect developed on the engine and the train stopped. After the train stopped appellee's foreman got off the train and signaled his crew to follow him, and appellee, as well as a large number of other employees, got off the train. Appellee and other members of the track crew followed their foreman down the track, but when he reached a point near the front of the engine the train started forward toward the camp, and immediately the employees who had gotten off the train hurriedly began to climb aboard, and as the train passed appellee he endeavored to board it. According to the evidence for appellee, and there is very little conflict in the evidence on this point, the step, at or near the point where appellee undertook to board the train, was twisted or bent under the car twelve or fourteen inches. Appellee and other witnesses testified that he undertook to board the train by using this defective step, and that when he swung onto this bent step his foot slipped off the bent step, and his left foot was caught under the wheels of the car and the leg and foot so mangled that it was necessary to am-

putate the leg a few inches below the knee. The speed of the train at the time appellee undertook to board it was variously estimated at from four to eight miles per hour, and appellee testified that he did not observe the bent condition of the step until after he had caught the handhold and swung from the ground to catch the step, and that the bent condition of the step was the cause of his foot slipping.

There is testimony to the effect that it was the duty of the engineer to give a signal when his train was ready to leave any given point, and the signal that the train was going to proceed on the trip to the camp was two blasts of the whistle and the ringing of the bell. This signal was not given at the time the train left the point where appellee was hurt, and the engineer testified that he only expected to proceed about two hundred yards further to a point where he could secure water. However, he testified that the reason he did not give the signal before starting his train was that he was busy endeavoring to remedy the defect in the engine and he did not have time to give the signal. There was also testimony to the effect that it was not uncommon for this signal to be omitted, and that when the train started to leave the place where appellee was injured the employees thought it had started for the camp, and that was the reason they undertook to get aboard.

The first assignment of error that is pressed by appellant is that appellee was not engaged in and about the master's business but was acting beyond the scope of his duties when he was injured, and for that reason a peremptory instruction for appellant should have been granted. It is urged that, since appellee left the train and was proceeding down the track in obedience to the orders of his foreman, he abandoned the business of the master and was acting beyond the scope of his duties when he left his foreman and, for his own convenience and comfort, undertook to board a moving train which had not indicated that it was going to proceed to the camp by giving the required

signal of two blasts of the whistle and ringing of the bell.

It was with this assignment in view that we have stated the facts with so much detail, and, under the facts in evidence here, we do not think the act of appellee in undertaking to get aboard this train severed the relation of master and servant. The appellee was aboard a train that had been furnished by the master for the purpose of transporting appellee and the other employees from their places of work to the camp. He left this train in obedience to the orders of his superior, and, since the train had stopped, and he had been called from the train by his foreman, being a member of the track crew, his interpretation of the signal to mean that track work was necessary to enable the train to proceed was entirely reasonable. With no information in regard to the defect in the engine, and having followed his foreman to a point where it could be observed that the track was not defective, with the train moving forward toward the camp, with the other employees hurriedly climbing aboard, appellee's conclusion that the train had resumed its trip to the camp was entirely reasonable and natural, and his act in endeavoring to get aboard the train, where he had a right to ride, was not an abandonment of the master's business and did not destroy the relation of master and servant.

The second ground for reversal urged by appellant is that it was not shown that the appellant knew, or by the exercise of reasonable care and diligence could have known, of the alleged defect in the step or stirrup.

The evidence discloses that the Gulf & Ship Island Railroad Company maintains a system of car inspection in the city of Hattiesburg, and that it was customary to inspect these log cars when they passed through Hattiesburg; but the evidence wholly fails to show that the particular car by which appellee was injured was inspected or was in good condition when it was delivered to appellant. It does not appear when the car was delivered to appellant or how long it had been in use in the woods. It does appear that the only inspection of the cars by

appellant was made after they were loaded with logs. The engineer, who was in sole charge of the selection of cars to make up the train by which the employees were to be transported to the camp on this occasion found this car on a side track in the woods, and, without any examination or inspection thereof, placed it for the use of the employees in riding from their places of work to the camp. The appellee was not a member of the logging or train crew, he had no connection with these matters and no occasion to use or be about the train or cars except in riding to and from his work, and the car was not an instrumentality furnished him until it was placed in the train on which he was invited or required to ride in reaching his home. It very clearly appears from the evidence that the step or stirrup on this car was bent and twisted when it was furnished for the purpose of transporting appellee and the other employees to the camp, and we think the finding of the jury that appellant did not exercise reasonable care and diligence in that regard is abundantly supported by the evidence.

It is next urged that the proximate cause of appellee's injury was his grossly negligent act in making an improper use of the step of the car by jumping on the car while it was in rapid motion, and that for this reason this cause should be reversed. Under the provisions of chapter 135 of the Laws of 1910 (sections 502 and 503, Hemingway's Code), it was a question for the jury as to whether, under the facts in evidence, the appellant was guilty of negligence which contributed to the injury, and all questions of negligence and contributory negligence were properly submitted to the jury under instructions directing that, in the event the jury should find from the evidence that appellant was guilty of negligence, the damages recoverable should be reduced in the proportion to the amount of negligence, if any, attributable to appellee. *Natchez & Southern Railroad Co. v. Crawford*, 99 Miss. 697, 55 So. 596; *Yazoo & M. V. R. Co. v. Carroll*, 103 Miss. 830, 60 So. 1013; *Mississippi Central Railroad Co. v. Robinson*,

106 Miss. 896, 64 So. 838; *Yazoo & M. V. R. Co. v. Williams*, 114 Miss. 236, 74 So. 835.

Counsel for appellant further earnestly insists that this case should be reversed for the reason that the jury were misled by certain statements made by one of the counsel for appellee in his closing argument. It appears from a special bill of exceptions taken during the progress of the trial that this attorney stated in his closing argument that—

“If the jury believe the plaintiff would, if not negligent, be entitled to receive forty thousand dollars, that in this case they should return a verdict for twenty thousand dollars.”

This statement of counsel was manifestly erroneous, and the objection of counsel to this remark should have been promptly sustained, and the jury instructed to disregard such statement; but, in view of the fact that the written instructions to the jury correctly and clearly announced the rule of law that must guide them in passing upon the questions of negligence and contributory negligence and the reduction of damages on account of contributory negligence attributable to the injured party, it is not probable that the jury was misled by this erroneous illustration, and we do not think this language of counsel would warrant a reversal. The other remarks of counsel which are complained of by appellant were not made of record by a special bill of exceptions, and will not be considered on this appeal.

Finally, it is urged that, in attempting to board the moving train, appellee was guilty of negligence which contributed to his injury, and that, in view of the contributory negligence of appellee, the verdict is grossly excessive. Appellee sued for twenty thousand dollars and the jury returned a verdict for eighteen thousand dollars. In view of the pain and suffering and the nature of the injury in this case, we would not disturb this verdict if the appellee had been free of negligence, but we are convinced that appellee was guilty of negligence which contributed

to his injury, and that the amount of the recovery has not been diminished in proportion to the amount of negligence attributable to him. It is difficult to apportion the negligence properly attributable to each of the parties, but we think it is clear that the jury failed to apply the rule of law applicable under our concurrent negligence statute, and that, under the facts in evidence in this case, the judgment should be reduced to twelve thousand five hundred dollars.

If the appellee will enter a remittitur here for five thousand five hundred dollars, reducing the judgment to twelve thousand five hundred dollars, the judgment will be affirmed; otherwise, it will be reversed and remanded for a new trial on the question of the amount of damages only.

*Affirmed conditionally.*

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DEDEAUX v. STATE.

[87 South. 664. No. 21482.]

1. CRIMINAL LAW. *"Accomplice" defined; question for court whether witness was an "accomplice" when facts undisputed.*

One who is present aiding, assisting, abetting, and encouraging the commission of a crime is an accomplice, and, where there is no conflict in the testimony as to the acts, conduct, or participation of a witness in an alleged crime, it is a question of law for the court as to whether the witness was in fact an accomplice.

2. CRIMINAL LAW. *Court should instruct as to weight of accomplice testimony, but language of instruction is in court's discretion.*

While a conviction may be had on the uncorroborated testimony of an accomplice, the court should instruct the jury that the testimony of an accomplice is to be weighed with caution, but the language in which the cautionary instruction is stated must, in a large measure, be left to the discretion of the trial court.

3. CRIMINAL LAW. *Larceny. Instruction omitting element of felonious or fraudulent taking error.*

Under section 1251, Code 1906 (Hemingway's Code, section 981), the word "felonious" as used in this section is not merely descriptive of the grade of the offense, but a felonious or fraudulent taking is necessary to constitute the crime of larceny, and an instruction which omits this essential element is erroneous.

4. CRIMINAL LAW.. *Evidence as to finding of other property similar to that stolen at different place held inadmissible.*

In a prosecution for the larceny of particularly described sheep, where the evidence shows that the sheep alleged to have been stolen had been killed and buried in a certain pit, it is erroneous to admit testimony that other sheep were found buried at a different place and in another pit.

5. CRIMINAL LAW. *That other sheep of same owner disappeared held inadmissible.*

In a prosecution for the larceny of particularly described sheep, it is error to admit testimony that several months prior to the alleged theft the owner of the particular sheep alleged to have been stolen also owned a large number of other sheep, and that they had disappeared from the range at the time of the trial.

APPEAL from circuit court of Stone county.

HON. D. M. GRAHAM, Judge.

Elmer Dedeaux was convicted of larceny of sheep, and he appeals. Reversed and remanded.

*Mize & Mize*, for appellant.

The attorney-general, in his last brief in this case, cites the following, taken from the case of *Crockford v. State*, 73 Neb. 1, to-wit: "The taking by one not the owner, into his possession, a calf running at large, with intent to convert it to his own use and deprive the owner of his property without his consent, constitutes the crime of actual stealing within the statute."

When this case is read, it will be found to be binding authority for appellant's contention, as the taking in or off the range of the calf in the *Crockford* case is very much

like the driving of the sheep off the range, in the instant case. The court at page 4, of the Crockford case uses the following language:

"There was really but one question for the jury to determine, and that was, whether, when the accused took the calf alleged to have been stolen into his possession he did so with the felonious intent to steal it, and these two instructions fairly submitted the issue to the jury as a question of fact which was its province to pass on."

The court, on reading the instructions, will find that the court in Nebraska, as in many other states, of its own motion instructed the jury on the general law applicable to the case, and, in both the instructions for the defendant and the state, the court emphasized that there had to be a felonious taking at the time, and further, that if the defendant took it, not with the intent to steal it, which embraces the felonious taking, and converted it to his own use after he had it in his possession, he would not be guilty of larceny. We know of no stronger case in support of our contention than the Crockford case.

The case of *Lamb v. State*, 40 Neb. 312, cited and commented on by the court in the *Crockford case*, *supra*, is a case of all fours with the instant case, where a hog was taken from the range into the possession of the appellant and the appellant was attempting to make away with it and share in the proceeds and was convicted of larceny, in which case the court said at the bottom of page 316, 40 Nebraska:

"That it was proper to submit in the form of an instruction and the court did submit an instruction, which told the jury that, in order to convict the defendant, he had to have the intent to steal at the time of taking the property. The intent to steal of course embraces all the elements of larceny."

Webster defines, "stealing" as "to take and carry away feloniously, to take without right or leave and with intent to keep wrongfully; as to steal the personal goods of another." This definition is adopted in the case of *Bald-*

*win v. State*, 35 So. 220. The primary meaning of the word "steal" is "to take and carry away feloniously." *State v. Minnick*, 102 Pac. 605, adopting the definition given by Webster.

The word "steal" or "stealing," in a criminal statute, when unqualified by the context, signifies a taking which at common law would have been denominated, felonious *Gardner v. State*, 26 Atl. 30. The elements of stealing at common law are the wrongful or fraudulent taking and removal of the personal property by trespass with the felonious intent to deprive the owner thereof and to convert the same to the taker's own use. *Barbe v. Territory*, 16 Okla. 562.

An indictment for larceny which merely alleges that accused feloniously did steal, take and carry away property described without alleging the intent to convert it, is sufficient, since the word "steal" means in common and legal parlance the felonious taking and carrying away of the personal goods of another. *State v. Perry*, 126 S. W. 717.

The word "steal" has a uniform significance, and in common as well as legal parlance means the felonious taking and carrying away of the personal goods of another. *State v. Richmond*, 128 S. W. 744. The word "steal" includes all the elements of larceny at common law. *Cohoe v. State*, 113 N. W. 532.

If the instruction had embodied the idea of taking with intent to steal the sheep in the instant case, it would have been unnecessary to use the word feloniously, but the instruction did not embrace this.

We lay down the proposition that no case will be found where the court holds that an instruction just alleging the defendant took property away with the intent to deprive the owner of it is sufficient as a statement of facts that would constitute larceny if believed by the jury. Of course, if it embodied the language that he stole the property or took it with intent to steal it, this would embrace feloniously and the statute of Mississippi defining grand larceny uses the word "feloniously."

Suppose the indictment had not used the word "feloniously," but just embraced the language of the instruction complained of. Then a demurrer to the indictment would be good; but the indictment in this case is good and an essential ingredient of the indictment is that the taking must have been felonious or fraudulent. Therefore, if the court holds that the instruction is good, it will be committed to the doctrine that you do not have to prove all the material elements of the indictment to convict the defendant, which is not and cannot be the law.

And, as to the contention that the jury had the right to look to the indictment to splice out the instruction, that is wholly untenable, because the indictment is a mere allegation and the instruction must be based on the proof. If it is true that the jury has to look to the indictment to splice out the instructions, then every erroneous instruction, where the indictment is good, could be spliced out and made a good instruction by supplying its deficiencies from the indictment; and we therefore submit that this court on this point, as well as on the other points discussed, is bound to reverse this case.

*W. M. Hemingway*, assistant attorney-general, for the state.

The first question for the consideration of the court is as to Vardaman Dedeaux being an accomplice. There is no testimony on this point but his. He had nothing to do with getting the sheep nor with bringing them home. It was Zeno's place. Consequently, the intent to take the property of Ladnier was missing. Ladnier was deprived of his property before the boy knew anything about it, and the property was in the possession of Elmer Dedeaux and his aiders, consequently the larceny was complete without his assistance or aid. Under the state of the case indictment could not have been found against Vardaman Dedeaux. His act was not ordinarily corrupt. 16 Corpus Juris, sections 1344, 1345, 1349, also section 1355.

The fact even that Vardaman Dedeaux had knowledge of the intended crime does not make him an accomplice. 16 Corpus Juris, section 1356.

Mere approval of the crime after the event does not constitute one an accomplice. The definition of larceny is elementary and the court will recognize the crime had been committed before Vardaman Dedeaux had anything to do with it. The presence of a person without the intent to do and abet their purpose of stealing does not make him guilty. *Hodgett v. The State*, 40 Miss. 522, 2 Mor. St. Cas. 1505; *McCarty v. State*, 26 Miss. 299; 1 Mor. St. Cas. 705.

This is conclusive that Vardaman Dedeaux was not an accomplice. The court, therefore, had the right to refuse to give instruction on the testimony of an accomplice.

In *Cheatham v. The State*, 67 Miss. 335, 7 So. 204, the court should not pile up words suggestive of the desire for the jury to dismiss as unworthy of consideration the testimony of the accomplice. *Wilson v. The State*, 71 Miss. 880.

A conviction may be had on the uncorroborated testimony of an accomplice. *Wilson v. State*, 71 Miss. 880; *Fitzcox v. State*, 52 Miss. 923; *White v. State*, 52 Miss. 216; *Osborn v. State*, 55 So. 52; 16 Corpus Juris, page 696, section 1423 and Note 60 and 61.

Instruction on this subject, which was refused, page 39 of the record, the jury was told to regard the testimony of the accomplice with great care, caution and suspicion, in connection with all the other evidence in the case. They were also told in the same instruction, that they are the judges of the credibility of the witnesses. This was placing too great a burden on the testimony of a seventeen year old boy where all of his relatives were taking sides in the trial. The jury was told to regard the evidence with suspicion. This placed too great a burden and should have been refused as it was for our court is getting away from such instruction.

Defendant objected to instruction for the state because it does not give the definition of larceny in technical terms; because it did not use the words "feloniously" or fraudulently, done—nor did it tell the jury that the intent to deprive the owner thereof must have been felonious or fraudulent. The instruction is not objectionable because it concludes with the words: "You should find the defendant guilty as charged in the indictment." This makes the indictment, which the jury had the right to take out with them, a part of the instruction.

In the case of *Edwards & Co. v. The City of Jackson*, 91 Miss. 429, 45 So. 14, this language was used: "Be it resolved by the Mayor and Board of Aldermen for the city of Jackson, proceeding under section 3011, of the Code of 1892, etc." The court said: "By this resolution of the board, section 3011 became as much a part of the ordinance as if the literal language had been incorporated into the resolution itself." So, when the jury is told to find him guilty as charged in the indictment, the indictment is made a part of the instruction.

It is only in instructions that attempt to define a crime that technical words should be used. *Sullivan v. The State*, 92 Miss. 828, 46 So. 248. The omission of words, however, in an instruction which attempts to define a crime, such words being statutory, would be error. *Rutherford v. The State*, 100 Miss. 832, 57 So. 224. So again, where the instruction does not attempt to define a crime, the omission of qualifying words is not error. *Dixon v. The State*, 106 Miss. 697, 64 So. 468; *McNeal v. The State*, 115 Miss. 678, 76 So. 625. It is not expected that every instruction should contain a definition.

It will be noticed that this instruction complained of, charges the intent; states that they were driven off the range, penned and killed; gives the value of the sheep and told the jury that they should find guilty as charged in the indictment, which charge was: "To unlawfully, wilfully and feloniously take, steal and carry away, etc.," a charge of the intent to deprive Lanius Ladnier, and

he was so deprived by the killing of the sheep after being driven off the range.

The instructions as a whole, properly stated the law. Vardaman Dedeaux did not make a highly intelligent witness but his testimony is unshaken on the material points. He was in a trying position. He was testifying against those who were close to him and no one would believe that he was deliberately making up his tale to injure his uncle, the accused.

He saw the sheep when they were brought in; witnesses testified to digging them up and they were identified by the owner from the marks on them. The owner did not give consent for their killing, did not know who to accuse until Vardaman Dedeaux told him. Then the sheep were found. With the testimony of Vardaman Dedeaux, Elmer Dedeaux is guilty, without it, the grandfather is in a very precarious condition.

The testimony objected to was, none of it, material. While it may not be entirely relevant, it is not in the sight of this case prejudicial. The fact that testimony was admitted which disclosed unprecedented growth in the flock of Elmer Dedeaux could not have been prejudicial to the decrease in Lanier Ladnier's flock or to the burying of the stolen sheep. There was no question as to the flock of sheep which Elmer Dedeaux had which were running at large but to those which he hid.

If the jury chose to believe Vardaman Dedeaux—and they did—the verdict is just and should be sustained.

W. H. COOK, J., delivered the opinion of the court.

Appellant, Elmer Dedeaux, together with his two brothers, was indicted for the larceny of five sheep, the property of L. W. Ladnier. There was a severance, and upon the trial of appellant he was convicted and sentenced to imprisonment in the penitentiary for two years, and from this conviction and sentence this appeal was prosecuted.

For a reversal of this cause appellant relies principally upon three grounds, and the facts necessary to an under-

standing of the questions presented for decision are substantially as follows: The codefendants, Ellis and Elvis Dedeaux, resided with their father Zeno Dedeaux, while appellant, who was married, resided about one-half mile therefrom. There was also living in the home of Zeno Dedeaux his grandson, Vardaman Dedeaux, a lad about seventeen years of age, and the conviction of appellant rests largely upon the testimony of this boy. Vardaman Dedeaux, who was also the nephew of L. W. Ladnier, the owner of the sheep alleged to have been stolen, left the home of his grandfather, Dedeaux, and went to reside with his grandmother Ladnier. Thereafter he furnished his uncle, L. W. Ladnier, certain information which caused Ladnier to secure a search warrant and go to the home of Zeno Dedeaux in search of certain sheep which he had lost. There he found a large number of sheep buried in two pits in the rear of Zeno Dedeaux's barn, and he was able to identify five of the sheep found in the smaller hole as being his property, and upon this discovery this indictment is predicated.

Vardaman Dedeaux testified that some time in June, 1920, appellant and the two codefendants left the home of Zeno Dedeaux late in the afternoon and went into the woods and came back after dark driving a number of sheep; that they called him from the house to assist them in getting the sheep into an inclosure; that he opened the gate and helped to pen them, knowing at the time that they were going to shear and kill the sheep; that he assisted in shearing one of them; that he watched them kill and bury the sheep; that he observed the marks of some of them and they were in the mark of L. W. Ladnier.

The first assignment of error which is pressed here is based upon the refusal of an instruction requested by defendant, the instruction being as follows:

"The court instructs the jury for the defendant that they are the sole judges of the credibility of the witnesses and the weight of the evidence, and that the testimony of

Vardaman Dedeaux in this case is what is known in law as the testimony of an accomplice, and that, in weighing his testimony, they should weigh it with great care, caution, and suspicion, and unless his testimony, weighed with great care, caution, and suspicion, in connection with all the other evidence in the case, convinces the jury beyond every reasonable doubt that the defendant stole the sheep, or participated in the stealing, as alleged in the indictment, then they shall find him not guilty."

It is contended on behalf of the state that the refusal of this instruction was proper for the reason that under the evidence the witness was not an accomplice. If there is a conflict in the testimony as to the acts, conduct, or participation of the witness in the crime alleged, it is then a question for the jury, under proper instructions, as to whether or not the witness was an accomplice, but, where there is no conflict in the testimony as to the acts and conduct of the witness, it is then a question of law for the court to say whether or not the acts, conduct, and participation of the witness in the alleged crime make him in fact an accomplice. There is no conflict in the testimony in this case as to the acts and conduct of the witness, and it clearly shows that he was present, aiding, assisting, abetting, and encouraging the commission of the crime, and we think, under the facts in this record, the witness was an accomplice.

While a conviction may be had on the uncorroborated testimony of an accomplice, the courts of this state are committed to the doctrine that it is proper for the court to instruct the jury that the testimony of an accomplice is to be weighed with caution (*White v. State*, 52 Miss. 216; *Fitzcox v. State*, 52 Miss. 923; *Green v. State*, 55 Miss. 454; *Cheatham v. State*, 67 Miss. 335, 7 So. 204, 19 Am. St. Rep. 310; *Wilson v. State*, 71 Miss. 880, 16 So. 304; *Osborne v. State*, 99 Miss. 410, 55 So. 52), and upon a new trial some cautionary instruction should be granted. We do not hold, however, that an instruction in the precise language of the one requested should be given, but, if

the jury is duly cautioned, the requirements of this rule are satisfied. In *Wilson v. State, supra*, this matter is fully discussed, and Chief Justice CAMPBELL there used language, which we quote to approve as announcing the correct view, the language there used being as follows:

"The court was not bound to pile up words suggestive of a desire for the jury to dismiss as unworthy of consideration the testimony of the accomplice. Having cautioned the jury as to the suspicious source of such testimony, it was proper to leave the jury to deal with it according to its effects on the minds of the jurors, who are not likely to accept too readily such testimony. The rule is for the presiding judge to inform the jury that the testimony of an accomplice is to be received and considered with caution, as from a polluted and suspicious source, but it must, in large measure, be left to the judge to choose the language in which this caution shall be given. There is no uniform rule. Cases vary with circumstances. In some cases stronger words of caution might be more appropriate than in others."

The next assignment relied upon brings up for review the action of the court in granting the state an instruction in the language following:

"The court instructs the jury for the state that, if they believe from the evidence beyond a reasonable doubt that the defendant Elmer Dedeaux, in company with others, in Stone county, Miss., on or about the 5th day of June, or on any date prior to the finding of the indictment in this case, drove off the range, penned, and killed five sheep belonging to L. W. Ladnier and described in the indictment, with the intent to deprive the owner thereof, and that said sheep were worth twenty-five dollars or more, you should find the defendant guilty as charged in the indictment."

Section 1251, Code of 1906 (Hemingway's Code, section 981), under which this indictment was drawn, is in part as follows:

"Every person who shall be convicted of taking and carrying away, feloniously, the personal property of an-

other of the value of twenty-five dollars or more, shall be guilty of grand larceny," etc.

The word "felonious" as used in this statute is not merely descriptive of the grade of the offense, but it is an essential ingredient of the crime of larceny, and, since this instruction omitted this essential element of the crime charged, it is erroneous. It is well settled in this state that to constitute larceny the taking need not be *lucrica causa*, but it is equally well settled that there must be a felonious or fraudulent taking of the property, and, unless the taking be felonious or fraudulent with the intent to deprive the owner of the property, it is insufficient to constitute the crime of larceny. *Hamilton v. State*, 35 Miss. 214; *Watkins v. State*, 60 Miss. 323; *Warden v. State*, 60 Miss. 638; *Delk v. State*, 64 Miss. 77, 1 So. 9, 60 Am. Rep. 46; *Akroyd v. State*, 107 Miss. 51, 64 So. 936.

The third and fourth assignments are based upon the alleged improper admission of testimony. The state was properly permitted to show that the five sheep described in the indictment were found buried in a pit near the barn of Zeno Dedeaux, but, over the repeated objections of defendant, witnesses for the state were permitted to testify about other sheep which were found buried in another and larger pit nearby. Appellant was indicted for stealing five sheep of a particular mark, and the place where the carcasses of these sheep were found was clearly and definitely fixed by the evidence. There was no evidence to connect appellant with the theft of any other sheep; in fact, upon his trial on this indictment such evidence would have been inadmissible, and it was highly prejudicial to appellant to permit evidence to go to the jury which indicated that there had likewise been many other sheep stolen. It is true that, after the state had been permitted to fully develop the facts that a large number of sheep had been found in this other and larger pit, the court finally sustained a motion to exclude this evidence, and thereupon instructed the jury not to consider any of this testimony, and, if this ruling had been adhered to, it might

have cured the error. However, after the court had announced this ruling, counsel for the state persisted in propounding questions which elicited answers which violated this ruling of the court, and some of these answers were permitted to go to the jury over the objection of appellant.

Again, over the repeated objections of appellant, the state was permitted to show that, several months prior to the time the sheep were found in this pit, L. W. Lagnier owned a large number of sheep which ranged in the territory between the home of Zeno Dedeaux and Wolf river, while at the time of the trial, which was in July, 1920, he only owned two. This testimony was clearly incompetent, and the admission of this irrelevant and incompetent testimony was necessarily prejudicial to the rights of appellant.

For the errors herein indicated, this cause is reversed and remanded.

*Reversed and remanded.*

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BELZONI LAND CO. v. ROBERTSON, STATE REVENUE AGENT.

[87 South. 669. No. 21548.]

1. **APPEAL AND ERROR.** *Supreme Court judge has power to grant appeals with supersedeas from judgment establishing lost record.*  
A judge of the supreme court has power, under section 4908, Code 1906 (section 3186, Hemingway's Code), to grant an appeal with supersedeas to the supreme court from a final judgment of a circuit court establishing a lost record of such court.
2. **APPEAL AND ERROR.** *Judgment, establishing lost record, from which appeal with supersedeas pending, not admissible in another suit as evidence.*

The record of a court, which has been lost and which has been re-established under section 3173, Code of 1906 (section 2514,

Hemingway's Code), and from which judgment re-establishing it an appeal with *supersedeas* has been prosecuted to the supreme court and is pending, cannot be used in evidence in another suit pending such appeal. The effect of the *supersedeas* is to prevent the use of the judgment during the time it is superseded. The judgment appealed from lies dormant, and no action can be taken which depends upon the judgment for its validity. *McConnico v. State*, 107 Miss. 265, 65 So. 243, cited.

APPEAL from chancery court of Humphreys county.

HON. E. N. THOMAS, Chancellor.

Suit by Stokes V. Robertson, State Revenue Agent, against the Belzoni Land Company. Decree for plaintiff, and defendant appeals. Affirmed.

*J. M. Cashin*, for appellant.

*Stokes V. Robertson* and *T. R. Foster*, for appellee.

ETHRIDGE, J., delivered the opinion of the court.

The state revenue agent filed a bill in the chancery court, alleging that his predecessor in office had caused a back assessment to be made against the appellant for the years 1909 to 1914, both inclusive, and that the tax assessor made the said assessment for thirty thousand dollars, for each of said years, and certified the same to the board of supervisors, and that the board of supervisors disallowed said assessment, and an appeal was taken to the circuit court, and that the said court approved the said back assessment at the valuation of thirty thousand dollars, for each of said years. A copy of the judgment of the circuit court was made an exhibit to the bill. He further alleged that for the year 1909 the state tax levy was six mills on the dollar, and that the state taxes amounted to one hundred eighty dollars for said year; that for the year 1910 the state tax levy was six mills on the dollar, and amounted to one hundred eighty dollars and for each of the subsequent years the state tax levy was the same, and the

amount of state taxes on the said assessment was the same, making a total amount of taxes due the state on said assessments one thousand eighty dollars. The bill set forth the amount of the county levy for the county taxes for each of the said years, and the respective amount of county taxes for each of said years, aggregating one thousand three hundred eighty dollars. It also set forth the levies or rates of taxation for the Mississippi levee district for each of the said years, and that they aggregated two thousand twenty-five dollars, making a grand total of all of the taxes due the state, county, and levee district, four thousand four hundred eighty-five dollars.

It was further alleged that the defendant, the appellant here, did not own personal property, and never had any assets other than land, and that said defendant had sold a great part of its land, and that the remaining land was then in demand, and that the complainant is advised that the defendant is offering all of its land, constituting the whole of its remaining assets, for sale for the purpose of applying the proceeds of the sale to the payment of dividends among its stockholders so as to place its property and effects beyond the reach of its creditors and especially the state of Mississippi, the county of Washington, and the Mississippi levee district, which bodies the revenue agent claims to have represented in his official capacity, and alleged that if said sales were permitted said corporation would become insolvent, and prayed for an injunction, restraining the defendant from selling its lands, and that a notice *lis pendens* be filed so as to become a lien upon the property, and also prayed for a personal decree against the defendant for the above-stated amount and for general relief.

Upon this bill an injunction was issued, restraining the defendant from selling its property. The defendant answered, denying that complainant's predecessor, the state revenue agent, had assessed it for taxes due the state of Mississippi, the county of Washington, and the Mississippi levee district for the said years, and denied that any as-

assessment for either of said years was made in the manner provided by law, and denied that the board of supervisors had disallowed or disapproved of any assessment against its capital stock made at the instance of the revenue agent, and denied that the revenue agent had prayed for and was granted an appeal from the circuit court from any order of the board of supervisors disapproving any said assessment, and denied that in the circuit court this matter came on for hearing, and that said assessment was duly approved at and for the valuation of thirty thousand dollars on its capital stock for each of the years mentioned, and denies that there is any record of Washington county, Miss., showing said alleged facts. It denied also that it owed or was indebted to the state, county, and levee district for taxes for said years, and denies that its capital stock was ever assessed for taxation in the manner provided by law, and denies that its capital stock is subject to taxation in the manner alleged by the complainant, and denied that any sum of money is due or owing by it to the complainant, or that the same had ever been demanded. It admitted that it took no appeal from the order or judgment of the circuit court mentioned in the complainant's bill, and admits that it failed to pay the sum mentioned by the complainant in said bill, and denies that it owes the complainant that or any other sum. The answer then avers that the order and judgment of the circuit court approving the pretended assessment mentioned in the bill added nothing to the efficacy of an utterly void assessment, and for this reason it took no appeal from the said order. It also denied that it has never owned personal property of any consequence, and alleges that it has sold lands on credits secured by notes and deeds of trust, all of which is alleged to be known to the complainant. It also denied that if permitted to sell its remaining lands it will withdraw and divert from its purpose its capital and make dividends that would render it insolvent, and denies that if its lands were sold it would be rendered insolvent. It then averred that on March 27, 1915, J. C.

Johnston, then state revenue agent, gave notice to the tax assessor of Washington county, Miss., in accordance with section 4740, Code of 1906 (section 7058, Hemingway's Code), to back-assess this defendant and other corporations in Washington county, Miss., for taxes on its capital stock for the years 1909 to 1914, inclusive, and directed the assessor to give notice to the defendant that it had been back-assessed by the tax assessor on thirty thousand dollars for each of the years 1909 to 1914, inclusive; that the said notice was dated March 27, 1915, and that the next meeting of the board of supervisors before which the corporations were notified to appear and object to said assessment was held on the first Monday of April, 1915, which was the 5th day of that month, so that ten days' notice in writing was not given to this defendant, pretended to be thus assessed by the said assessor, under the direction of the revenue agent, as required by section 4740, Code of 1906. It further alleged that the assessment roll for the year 1915 was on said date in the hands of the assessor in process of making, to be returned by him to the board of supervisors on the first Monday of July, 1915, that the assessment roll for the fiscal year 1914 was then in the hands of the tax collector of Washington county, and also that the defendant had not received any notice as required by law. This defendant's attorney examined the assessment roll for 1915, and found the assessor had not made any assessment against this defendant at the instance of the revenue agent, and so there was no assessment before said board of supervisors to approve or disapprove. It then avers that the said defendant and the board of supervisors accidentally discovered that said tax assessor had pasted the sheets given him by the revenue agent in the back of the 1914 roll. It then averred that this did not constitute an assessment, and that the defendant was not required to recognize this as an assessment, or to object to it: First, because it is alleged it was a mere nullity; and, second, because it is alleged that it had not received any notice or been given ten days' notice by

said section, as required by section 4740 of the Code. It further alleged that on the 5th day of April, 1915, the board of supervisors made an order rejecting said assessment. It is further alleged that subsequent to April 4, 1915, a representative of the revenue agent had an interview with the president of said corporation with the view of fixing the amount at which the defendant should be assessed, and that it was agreed that the matter should be taken up at some later date, and that in the meantime no steps should be taken against it by the revenue agent. It is also averred that without further negotiations with the defendant, and in violation of the said agreement, on the 7th day of December, 1915, the said attorney for the revenue agent caused to be entered on the docket of the circuit court of Washington county, Miss., a case styled *J. C. Johnston, State Revenue Agent, v. Ritchie Land, Improvement & Manufacturing Co., et al.*, No. 1736 on said docket; and caused the clerk of the said court to enter the order made exhibit to the complainant's bill above referred to. Thereafter on application the answer was amended in various particulars.

The original papers during the progress of the chancery suit were lost, and a proceeding was undertaken in the circuit court to restore the record under the provisions of section 3173, Code of 1906 (section 2514, Hemingway's Code). The revenue agent answered this petition to restore, setting forth in the answer certain features of the petition which were alleged to be incorrect, and also alleging that the heirs of J. C. Johnston, the former revenue agent who had died subsequent to the said assessment, were interested in the result of the suit to the extent of his commissions, and should be made parties. It was also alleged that Washington county and the Mississippi levee district were parties interested, and should be made parties defendant to the petition to restore the record. The revenue agent was given eleven days' notice of the petition to restore by summons, and objected to proceeding with the trial to restore the record at that term for the

reason that thirty days had not been given him. The circuit court proceeded to hearing, and entered an order establishing the records as set forth in the defendant's petition. From this judgment the revenue agent took an appeal to this court, which has not yet been decided, and obtained from the writer an appeal with *supersedeas* from said order. When the case came on for trial in this cause the revenue agent introduced the order of the circuit court of Washington county, making the assessment and directing it to be certified to the tax collector, reciting in the said order that more than ten days had been given before the board of supervisors, and further reciting that no objections had been filed to the assessment in that court. When the revenue agent rested his case the defendant offered the record as re-established by the circuit court, from which judgment the appeal with *supersedeas* had been allowed, to which evidence the revenue agent objected: First, because it would be a collateral attack upon the judgment of the circuit court; and, second, because the papers do not purport to be the papers in the original file in the case, but a purported substituted file, and that an appeal had been granted to the supreme court from the final order of the circuit court in attempting to re-establish said file of papers with *supersedeas*. The revenue agent offered in evidence the petition for the appeal and *supersedeas* and the order granting the same.

The defendant did not seek to make its answer a cross-bill, and have the judgment of the circuit court making its assessment against it enjoined and canceled as being void *ab initio*; nor did it seek in this proceeding to show the contents of the papers which were lost by secondary evidence. It is contended by the appellant that the action of the judge of the supreme court in granting an appeal with *supersedeas* is void, and that the record sought to be introduced is validly established by the judgment of the circuit court, and that no appeal lies from the order of the circuit court re-establishing the record, but, if an appeal does lie from said order, that still it is admissible in evi-

dence because the appeal does not destroy the judgment of the circuit court. The decree of the chancellor was for the complainant.

We are not advised what reasons were announced by the chancellor for his decree, nor what his opinion was as to the various questions that arise in the case. At the threshold of the appellant's case is the question as to whether the record re-established by the circuit court from which an appeal was prosecuted with *supersedeas* is admissible in evidence in this case. We are not impressed with the argument that a judge of the supreme court has no power to grant an appeal or to grant a *supersedeas*. The statute expressly empowers the judges to grant such appeals, and also the power to grant *supersedeas*. Section 4908, Code of 1906 (section 3186, Hemingway's Code). The appeal and the *supersedeas* are directly pertaining to the jurisdiction of this court, because judgment having been rendered and an appeal lying from final judgments of the circuit and chancery courts. 34 Cyc. 610, and authorities cited.

The next question is, What effect does a *supersedeas* have upon the judgment superseded? Is a judgment superseded a thing that can be used either in attack or defense?

Bouvier's Law Dictionary (8th Ed.) vol. 3, defines *supersedeas* as follows: "The name of a writ containing a command to stay the proceedings at law.

"An auxiliary process designed to supersede the enforcement of the judgment of the court below, brought up by writ of error for review."

In 8 Words & Phrases, p. 6796, it is said that:

"Whatever is done under the judgment after and while it is suspended, being done without authority from the judgment, which is then powerless, should be set aside as improperly and irregularly done."

The effect of the *supersedeas* is to prevent the use of the judgment during the time it is superseded. The proceeding lies dormant; no action can be taken which has its

foundation in the judgment. This court has decided heretofore that it is not admissible in evidence. See *McConico v. State*, 107 Miss. 265, 65 So. 243. In that case it was sought to prove a debt to a bank by judgment against the bank, from which judgment an appeal had been prosecuted. In the course of the opinion Judge COOK, speaking for this court, said:

"In order to establish the insolvency of the bank, the court permitted the state to introduce in evidence, over the objections of defendant, the record of a judgment rendered by the circuit court against the bank for nine thousand three hundred twenty-two dollars and twenty-five cents in favor of the Bank of Winona.

"The record shows that, at the time the record of the judgment was introduced in evidence, the bank against which it had been rendered had perfected its appeal from the said judgment, and the appeal was then pending in this court. The judgment having been appealed from, the record of same was not evidence tending to show that the claim on which it was based was in fact a liability of the bank of which the appellant was cashier. The introduction of the judgment was error."

This being true, it was not permissible to introduce the re-established record pending an appeal with *supersedeas*, and the judgment of the circuit court, being a court of general jurisdiction, carries with it verity as to its recitals of jurisdictional matters. Looking at the record before us in the light of these principles, the chancellor was correct in rendering the judgment. We do not deem it necessary now to decide what effect this record would have had upon the judgment had no appeal been prosecuted. It is unnecessary in this regard to decide the other questions presented, and the judgment is affirmed.

*Affirmed.*

## WILLIAMS v. STATE.

[87 South. 672. No. 21496.]

1. CRIMINAL LAW. *Evidence insufficient to show conviction of prior offenses under statute.*

Where a person is indicted for the unlawful sale of intoxicating liquors under section 1 (c), chapter 214, Laws 1912 (section 2086, Hemingway's Code), which provides that on conviction the punishment shall be "by imprisonment in the state penitentiary not less than one year nor more than five years, if the conviction is for an offense under this Act committed after the person convicted has been convicted and punished for two former offenses thereunder," and the testimony as to the two former convictions and punishments showed that the defendant had pleaded guilty in a justice of the peace court and prosecuted an appeal to the circuit court, in which court the cases were docketed, and the minutes of the circuit court fail to show any disposition of the cases in that court, they are still pending cases in the circuit court. Consequently there is no proof of two former convictions and punishments under this act.

2. CRIMINAL LAW. *Punishment as for first conviction only held warranted.*

Under this testimony the defendant can only be punished as for a first conviction under section 1 (a) of this act.

3. CRIMINAL LAW. *Minutes of circuit court cannot be contradicted by parol; supreme court orders and judgments shown by minutes.*

The circuit court speaks through its minutes. These court minutes import absolute verity and cannot be contradicted by parol. The orders and judgment of this court are shown on its minutes.

APPEAL from circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Ascus Williams was convicted of unlawfully selling intoxicating liquors, and he appeals. Affirmed, and remanded for sentence.

*Hilton & Hilton*, for appellant.

We concede that this defendant was guilty of selling whiskey on this occasion as shown by the record. We concede that on two former occasions he pleaded guilty to selling whiskey for two separate offenses and was fined fifty dollars and five days in jail in each. But we contend that there was no punishment and convictions under section 2086 of Hemingway's Code for the first and second offense; that there is no legal proof of any convictions whatever for former offenses. Section 727 of Hemingway's Code require the circuit court to keep minutes of its proceedings. The circuit court shows by its dockets and appeal, papers therein on appeal of the two convictions in the justice court, which made the justice court convictions inoperative, and therefore the minutes of the circuit court must speak dismissal with writs of *procedendi* or convictions carrying punishments under 2086 before the third conviction may be had. In the case of *Childress v. Carley*, 92 Miss. 571, this court has spoken as to the sanctity and verity of circuit court minutes. We presume that the state's counsel would not contend seriously that there must not be a minute record of the disposal of these cases. He alleges, however, that the records show that one of these cases were dismissed to the mayor's court with a writ of *procedendo*. This record is not the minute record, however, the state's case fails because it only shows one conviction. Counsel cites the statement of the lower court that the payment of the fines by the defendant operated as a dismissal. The answer to that is twofold; first, the court below excluded evidence showing the true facts about this matter; second, the evidence with reference to this payment was incompetent and illegal.

Counsel contends there was no error in overruling the demurrer and cites the Robinson case. In the Robinson case the indictment set forth in detail the two former acts of the defendant, which of course sufficiently charged the crime. But here two former sales in courts of competent

jurisdiction were not alleged, but merely alleged that he had been convicted of two former offenses of like character, without setting forth any detail to show the crime.

Counsel argues that competent proof has been introduced. He cites the evidence of Judge Kennedy. We think the trouble with Counsel's argument is that he has overlooked paragraph (c) of section 2086, of Hemingway's Code, which provides that to maintain the third conviction there must have been two former convictions. hereunder. It does not say two former convictions, but it says two former convictions and punishments, and the convictions and punishments must be under this statute. Counsel argues that the answer to this proposition is that he was tried for both offenses on the same day and was not confronted with a prisoner who had already been charged under paragraph (a), and not having an affidavit made under paragraph (b) could, therefore, not convict and punish under paragraph (b). It seems to us that it would have been a very small matter after the first conviction to have had the affidavit amended so as to bring the case under paragraph (b). We think that until there is a conviction and punishment shown under paragraph (b) there can certainly be none under paragraph (c). We think again that counsel's contention helps us here for the reason that he contends himself there has been no conviction under paragraph (b) but both of the former were under paragraph (a), which if true still shows there is no conviction under paragraph (b) and therefore can be none under paragraph (c).

Inasmuch as there has been no attempt in either of the two other trials, to prosecute under section 2086, of Hemingway's Code we think this case should be settled as was the case of *Britton v. State*, which is squarely in point.

In that case there was an attempt to convict for the second offense under chapter 214 of the Acts of 1912. This court held that because the act was committed prior to 1912 that section 1573 of the Code of 1906, which is section 1335 of Hemingway's Code, kept alive the Acts of

1908, chapter 115, section 1746, under which the defendant could be punished as a first offense and this should be done although the Act of 1912 is not applied. This is exactly the attitude here; the convictions in the justice court relied on were no attempts to prosecute under section 2086 of Hemingway's Code and therefore under section 1335 of Hemingway's Code chapter 115 of Acts 1908, applied to the first convictions and they should be held as convictions under that act, should they be construed as competent proof in the case at all.

Counsel contends that the state's instruction was correct, that it followed paragraph (c) of section 2086 of Hemingway's Code which is as follows: "By imprisonment in the state penitentiary not less than one year nor more than five years, if the conviction is for an offense under this act committed after the person convicted has been convicted and punished for two former offenses hereunder."

The instruction for the state did not require the jury to believe that he had been convicted and punished for two former offenses under the act. The state did not show that he had been convicted and punished for two former offenses under the act, but merely charged the jury that if he had been convicted of two offenses of like character it was sufficient to convict him on this charge.

We submit to the court that the appellant has received no semblance of a fair trial for the crime for which he has been convicted, and although he be a negro and has sold whiskey before, we think that justice and fair play under our law require punishment for crime charged and not convictions on general principles.

*H. Cassedy Holden*, for appellee.

Selling liquor is a violation of section 2086, Hemingway's Code (chapter 214, Laws of 1912). Therefore it was proved that the defendant had twice before been convicted, sentenced and punished for a violation of this stat-

ute. His punishment consisted of a fine of fifty dollars and cost and five days' imprisonment in each case until same should be paid, for each former conviction. The fines and costs were paid by him and he, therefore, underwent the punishment imposed upon the convictions for two separate offenses prior to the offense charged in the indictment in this case.

It is contended that although the defendant was proved to have been convicted twice of selling liquor prior to the offense charged in the indictment, he was not proved to have twice violated the above statute. It is said that the two former convictions and sentences indicate that they were not for a violation of the above statute since both fines were fifty dollars and costs which would indicate a first offense covered by paragraph a of the statute. The answer to this contention is obvious. The defendant was tried by Justice of the Peace Kennedy for two separate offenses committed at different times. There were two affidavits and the defendant was tried separately on each affidavit but on the same day. At the time these trials took place, Justice of the Peace Kennedy could not have fined the defendant under paragraph b of the statute. He was not confronted with a prisoner who had been tried, convicted and punished for retailing liquor. He was confronted with a prisoner against whom two affidavits had been made, charging two separate offenses for which the defendant had never been tried and convicted. His honor was eminently correct in assessing a fine of fifty dollars and costs in each case against the defendant, proceeding under paragraph a.

But, when the defendant was indicted by a grand jury, based upon a violation of the statute which occurred on August 12, 1919, the circuit court was confronted with a prisoner who had been previously convicted of two like offenses in the justice of the peace court of W. T. Kennedy.

Paragraph c of the statute reads as follows: "By imprisonment in the state penitentiary not less than one year

nor more than five years, if the conviction is for an offense under this act committed after the person convicted has been convicted and punished for two former offenses hereunder. (Laws of 1912, ch. 214, in effect March 8, 1912.)”

Under this statute it was, therefore, proper for the grand jury to indict the defendant for a third offense. And it was proper, upon conviction, for the circuit court to sentence the defendant in accordance with this paragraph of the statute.

Instructions: The appellant complains of the instruction given in behalf of the state which appears at page 59 of the record. There is nothing wrong with this instruction. It is based squarely upon the law and the facts of the case. It follows paragraph c of section 2086, Hemingway's Code (chapter 214, Laws of 1912) a more proper instruction in the case could not be imagined.

The appellant complains of the refusal of the court to grant three instructions for the defendant which appear at pages 59, 60 and 61 of the record. A reading of these instructions will instantly reveal their lack of propriety.

As to the first refused instruction it is only necessary to say that it was not incumbent upon the state to prove two former convictions in the circuit court. It was sufficient if two former convictions in the justice of the peace court were proved, and these convictions were actually proved.

As to the second refused instruction, it will be sufficient to say that it made no difference whether or not the two appealed cases from the justice of the peace court to the circuit court had been disposed of. It was only necessary to show that the defendant had been twice before convicted and punished, and this was shown. As to the third refused instruction it need only be said that it was not imperative that the state prove that the punishment for the two former convictions had been carried out according to the judgment of the court. It was only necessary to prove that the defendant had twice before been

convicted and punishment inflicted by the court. Not only was this shown, but it was shown further that the punishment inflicted by the court had been carried out in each of the former convictions before the justice of the peace. Moreover, all three of these refused instructions attempt to submit to the jury questions of law and not questions of fact. Questions of law should not be submitted to the jury, as this court well knows.

Counsel for appellant cites the following cases to sustain his several contentions: *Britton v. State*, 53 So. 530; *Boroum v. State*, 63 So. 297; *Gaston v. State*, 65 So. 563.

In the *Britton* case the defendant was convicted and sentenced as for a third offense, under chapter 214, Laws of 1912. The indictment did not charge the third offense. The court, therefore, held that the defendant could not be convicted of a third offense, since it was not charged in the indictment. This case has no bearing upon the issues in the case at bar.

In the *Boroum* case the defendant was convicted and sentenced for a second offense under chapter 214, Laws of 1912. The evidence developed the fact that the first offense charged in the indictment had been prior to the enactment of the said chapter 214, Laws of 1912. The court, therefore, properly reversed and remanded the case for a proper sentence as for a first instead of a second offense under the said chapter.

The *Gaston* case is practically identical with the *Boroum* case. None of these cases constitute guiding authority for the court in the case at bar. The indictment in the instant case charges a third offense sufficiently and properly. The evidence undoubtedly proves a third offense as charged in the indictment.

SYKES, J., delivered the opinion of the court.

The appellant was indicted, tried, convicted and sentenced to serve a term of five years in the penitentiary under section 1 (c) of chapter 214, Laws 1912 (section 2086, Hemingway's Code). Section 1(c), relating to a punishment for the unlawful sale of liquor under this act,

provides that this punishment shall be "by imprisonment in the state penitentiary not less than one year nor more than five years, if the conviction is for an offense under this act committed after the person convicted has been convicted and punished for two former offenses hereunder." The testimony relating to the two former convictions and punishments of the appellant under this act was as follows:

W. T. Kennedy, a justice of the peace, testified that two affidavits for selling whisky on different dates were made against this defendant before him and that the defendant pleaded guilty and was sentenced to pay a fine of fifty dollars in each case and the defendant appealed the two cases to the circuit court. The two judgments in the justice of the peace courts were also introduced in testimony, together with the record of this court, which showed that the cases were duly appealed to the circuit court. The records of the circuit court showed that these two cases were docketed in that court and the minutes of the circuit court show no disposition of either one of them. In the circuit court it appears from this testimony that there was also a docket there kept called the court's docket. On this docket a notation was made in one of these cases, apparently in the handwriting of the judge, to the effect that it was dismissed with a writ of *procedendo* to the mayor's court. In the other case it seems there was some notation to the effect that the case "was put on file."

Dehors the court records it is shown that by some agreement the defendant was allowed to pay a fine of one hundred dollars in settlement of these two cases. All of this testimony was introduced to show the two former convictions and punishments of the defendant under this act. The records of the justice of the peace court showed that these two cases were properly appealed from his court to the circuit court. The minutes of the circuit court should show the disposition of the cases by that court. This court speaks through its minutes. These two cases were prop-

erly appealed and docketed in the circuit court and the minutes of that court fail to show any disposition of them. Section 1007, Code of 1906 (section 727, Hemingway's Code), provides for the keeping and signing of the minutes of courts wherein the proceedings of the court are recorded. These court minutes import absolute verity and cannot be contradicted by parol. *Jones v. Williams*, 62 Miss. 183; *Hammond-Gregg v. Bradley*, 119 Miss. 72, 80 So. 489; *Childress v. Carley*, 92 Miss. 571, 46 So. 164, 131 Am. St. Rep. 546.

In the absence of any order or judgment of the circuit court appearing upon its minutes, it follows that these two cases are still pending in the circuit court and that the defendant has not been convicted and punished for two former offenses under this statute. His conviction under this indictment is therefore for a first offense and he should have been sentenced therefor under section 1 (a) of his law. *Boroum v. State*, 105 Miss. 887, 63 So. 297, 457; *Gason v. State*, 107 Miss. 484, 65 So. 563.

The judgment of the lower court is affirmed, and the cause remanded for sentence as for a first offense under paragraph (a) of this law.

*Affirmed and remanded for sentence.*

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STATE *ex rel.* BERRY, *Dist. Atty.*, v. HUNDLEY, *et al.*

[87 South. 890. No. 21659.]

1. OFFICERS. *Bond of officer binding on every person who subscribes it.*

A bond, delivered and approved as a bond of a public officer required by law in order that he may hold and receive the emoluments of the office, is binding on every person who subscribes it under the provisions of section 3463, Code of 1906 (section 2801, Hemingway's Code), although the office is erroneously described therein.

2. OFFICERS. *Bond of officer security for duties subsequently imposed on him.*

The bond of a public officer is a security, not only for the performance of the duties incumbent on him when the bond was executed, but for such other duties, not different in kind, which the legislature may thereafter impose on him.

3. COUNTIES. *Loss through issuance by treasurer of receipt for moneys derived from bonds before it came into his possession covered by bond.*

It is the duty of a county treasurer not to issue a receipt for money derived from the sale of county bonds until the money has come into his possession, and any loss resulting to the county because of the issuance by the treasurer of such a receipt before actually receiving the money is covered by his official bond.

4. COUNTIES. *Treasurer's bond security for purchase money of bonds prematurely receipted for.*

Where a treasurer of a county enables a bank to receive the purchase money of bonds sold by the bank for the county by delivering to the bank his receipt for the money to be delivered by it to the purchaser of the bonds, and fails to collect such money from the bank and turn it over to his successor in office, his official bond is security therefor, although his successor could have himself collected the money from the bank.

APPEAL from chancery court of Tishomingo county.

HON. A. J. MCINTYRE, Chancellor.

Suit by the state, on the relation of J. E. Berry, for the use of Tishomingo County against W. N. Hundley and others. Decree for defendants, and plaintiff appeals. Reversed, and decree against defendants.

W. J. Lamb, for appellant.

The statute making the county treasurer also treasurer of the money belonging to good road district, expressly says that he shall be liable on his bond, but does not require or say anything about giving an additional bond.

When Hundley qualified as treasurer in January, 1908, he made bond as required by law and took charge of his duties as county treasurer, and in April, the board of

supervisors required Hundley to give an additional bond, which was done and was approved at a special term of the board of supervisors held on the 15th day of May, 1908, and this is the bond that suit is brought on to recover for the default on the part of Hundley in failing to pay over said money.

On the trial of this cause the court allowed the bondsmen to testify over the objections of the appellant, that they would not have signed the bond if they had known that the bond was to cover this specific fund. We contend that such a defense ought not to have been allowed, and the objection to this proof should have been sustained instead of overruled.

We further contend that it makes no difference whether they would have signed it or not; they did sign it, and are liable as such, we don't suppose there is any person who would sign a bond for the forthcoming of money, if he knew the principal was going to be in default, and that is about all that can be said for such a defense on the part of the appellees.

Chapter 149, of the Acts of 1910, makes the funds coming into the hands of the county treasurer for the purpose of building good roads as much a general county fund as any other fund that comes into his hands, and expressly says that the county treasurer shall be liable on his bond.

Now, let's look at the bond itself and see what it says: "Wherefore, the condition of this obligation is such, that if the said W. M. Hundley shall faithfully perform and discharge all the duties of said office of treasurer general county fund and all acts and things required by law, or incident to the said office of county treasurer of Tishomingo county, Mississippi, during his continuance therein, then the above obligation to be void, otherwise to remain in full force and virtue."

The court will notice that this bond not only required Hundley to faithfully perform and discharge all of the duties of said office of treasurer general county fund, but

also further provides that he would faithfully perform and discharge all acts and things required by law or incident to said office of county treasurer of Tishomingo county, in Mississippi.

Section 6 of chapter 149 of the Acts of 1910, made him treasurer of this fund, and the act also provides that he is liable on his bond therefor. No special bond is required by law for the protection of this fund, but it comes into his hands by virtue of his office and placed there as much by law as any other fund that comes into his hands.

The case of *Hall v. Lafayette County*, 69 Miss., page 529, is directly in point and decides every proposition against the contention of the appellees in this case and in favor of the appellant, and the same defense was made in the case of *Hall v. Lafayette County*, *supra*, that is being made in this case, and the court in that case held against the contention of the appellee.

In the case of *Hall v. Lafayette County*, *supra*, page 539, the court said: "If the general bond given should be so worded as to include, in terms, school money, the obligors would be bound for such money, for the requirement by statute of an additional bond, in an amount not less than the school funds likely to be in his hands at any one time, looks to the fact, and not the form of security, and may be satisfied by a single paper as well as several."

Quoting again from the same opinion, the court said: "But if the constituted authorities, through ignorance, inadvertence or otherwise, in dealing with this matter were to not follow the law by requiring a separate and additional bond for the performance of his duties by the county treasurer 'as to school-funds and to take a bond at the beginning expressly stipulating for the performance of all his duties, including his dealings with school-funds it would be enforceable according to its terms, because of the contract."

This bond in question expressly provides that Hundley shall faithfully perform and discharge all acts and things required by law or incident to said office of county treas-

urer. Now, one of the things required by law was that he should be treasurer of the good road district fund, and the law provides that he shall be liable on his bond for such funds.

We think the remark of the court in the case of *Hall v. Lafayette County, supra*, very applicable to this case, when the court said: "It is incontrovertible that Hall and his sureties intended to give a bond sufficient in its penalty and its terms to cover all moneys that should be in his hands from every source. They contracted for that, and designed in good faith to carry out the contract, and thought they had done so, and it was an afterthought to escape liability because only one bond was given."

We think the bondsmen in this case when they say that they would not have signed the bonds if they had known it was to cover this money, is only an afterthought to escape liability.

Section 2801 of Hemingway's Code, expressly provides: "if irregular in any other respect, such bond, if delivered as the official bond of the officer, and serving as such, shall be obligatory on every one who subscribed it for the purpose of making the official bond of such officer to the full penalty, or, if it has no penalty, to the full penalty of the bond which might have been required."

This bond was made, signed and sealed as the official bond of the county official, and the statute provides that when this is done the bond shall be obligatory on every one who subscribes it, for the purpose of making the official bond of such officer to the full penalty. We do not see how the appellees can be serious about the defense made by them in this case.

In the case of *Arnold v. The State*, 77 Miss. 463, this court said: "We regard the rule as settled in this state that the public officers are liable on their official bonds for the absolute safety of all moneys coming into their hands, unless when it is lost by the act of God or the pub-

lic enemy. It was so ruled by this court in the case of a tax collector's bond in *State v. Lee*, 72 Miss. 281."

The bondsmen in this case are like all other endorsers they took the risk when they went on Hundley's bond. The board of supervisors are looking to Hundley's bondsmen, and the bondsmen will have to look to their unreliable, or unfaithful, principal.

In the case of *Griffin v. Levee Commissioners*, 71 Miss. 770, this court said: "The idea that the tax collector may make a general deposit of public money in bank and thereby absolve himself from liability to pay over as he is by law required to do, is so utterly unreasonable as to need no combating. Like all others depositing funds in bank, the tax collector took the risks involved in so doing. The board looks to its officer, and the officer must look to his unreliable or unfaithful banker.

According to the chancellor's opinion, when he decided the case, the appellant is entitled to recover. He finds in his opinion that Hundley was county treasurer, that Hundley had the money to his credit in the bank, and that Hundley has never paid this money over to his successor or anyone else. The chancellor also finds that the appellees signed his bond, and because of this fact he was able to perform the duties as county treasurer and hold the office of county treasurer; still, the chancellor says that while Hundley owes the money, and defaulted in the payment of the same, and fails and refuses to pay the money, still his bondsmen are not liable for anything.

We submit to the court that a mere statement of the case, a mere statement of the undisputed facts and the admitted facts, is a complete argument of this case, and that the appellant was entitled to a judgment against the bondsmen of Hundley, county treasurer.

The decree of the court finds that complainant is entitled to a decree against the defendant W. M. Hundley upon his bond as treasurer of said county in the sum of thirty-five thousand seven hundred dollars less the amount paid on said amount, to-wit: Twenty thousand six hun-

dred nine dollars and thirty-six cents; together, with interest thereon at the rate of six per cent. per annum, from the first Monday of January, 1912, it being the second day of said month, until paid, and the cost in this case, for the payment of which execution may issue at law.

We respectfully submit to the court that this case should be reversed and that judgment be given by this court against his bondsmen for the amount shown to be due according to the decree of the chancellor.

*Boone & Worsham*, for appellees.

Appellees are not liable as sureties on Hundley's bond in this suit for the reason: First, because they only signed the bond for the general county fund and not for any special fund. Second, because there was no law at the time they signed the bond sued on in this case authorizing any such funds to go into the hands of the treasurer, nor was there any law at the time they signed this bond authorizing the issuance of the bonds, the proceeds of which is sued for in this case.

There can be no doubt from this record that the bond sued on in this case was simply for the general county fund and was not intended to cover any other funds. We, therefore, contend that although the bond provided in the printed portion thereof that Mr. Hundley should faithfully perform and discharge all the duties of the office of treasurer yet following that expression immediately is the words "general county fund," and in the whereas clauses it is referred to as a bond for the general county fund. There can, therefore, be no serious controversy over the fact that the real contract undertaken by the appellees as sureties on Hundley's bond was to protect the general county fund. At the time this bond was executed the general county fund was well understood and it could not possibly have been in contemplation of the parties making the contract that they were contracting for the security of a fund three times, and which could just as easily have

been ten times, greater than the amount of the bond they were executing. Nor can it possibly be contended that they were executing or contracting to secure a fund for which there was at that time no law in the state of Mississippi by which the fund sued for in this case could be created.

Appellant relies upon the case of *Hall v. LaFayette County*, 69 Miss. 529. I have no quarrel with the principles laid down in the Hall case. Indeed, the Hall case is direct authority for my contention. The reason the court held the sureties liable for the secured bond in the Hall case was that when they signed what was called the general bond that the evidence in the case showed that the sureties were intending to secure all funds coming into the treasurer's hands as treasurer; and the facts in that case show that it was the intention of Hall and his sureties in giving that particular bond to secure the proper disbursement of all the funds that were to come into his hands, and the penalty of the bond was fixed with a view to this end. Page 531 of the Hall case; and the court upheld the bond in the Hall case to be enforceable because of the contract, independent of the statutory effect of the bond. The court further said in the Hall case while there was no formal and express agreement as to the terms of the bond, it was as plainly implied from what occurred as if it had been expressed.

In the case at bar everything shows that the clear intention of these sureties was simply to be sureties on a general county bond, and not for any special funds whether it be for security or any other purpose that would have an effect to create a liability out of and beyond the ordinary liability of a county treasurer on his general county bond.

The only way to hold appellees on this bond for this fund sued for in this case would be for equity to make contract for parties; but the Hall case, *supra*, says: "Equity will not make contracts for parties. Its power is confined to enforcing those made by the parties." In the Hall case the sureties were made to pay because it was

clearly in the mind of the parties to secure the school fund; but in the case at bar it cannot be contended by any stretch of the imagination that it was in the minds of the parties making this contract sued on in this case to secure the funds sued for in this case. It was necessary to reform the bond in the Hall case to make it comply with the contract actually made by the parties, but there is not a single fact in this record that would justify the reforming of the bond in this case so that it would cover any other fund than the general county fund, as understood at the time the bond was signed.

One of the most frequent applications of the so called *strictissimi juris* rule, that the liability of sureties on official bonds is confined to the obligations, and terms as assumed by them is with reference to their responsibility for their principals in the performance of duties imposed by the legislature subsequent to the execution of the bond. Sureties are persons favored by the law. Their obligations are ordinarily assumed without pecuniary compensation and are not to be extended by implication or construction. The liability, is as it is observed, *strictissimi juris*. They have a right to stand upon the terms of their obligation, and having consented to be bound to a certain extent only their liability must be found within the terms of that consent strictly construed. *Morrow v. Wood*, 56 Ala. 1.

The holding of the courts is uniform on this subject. Chapter 149 of the Acts of 1910, section 6 thereof, under which this road district was created does not provide that money for the sale of the bonds shall be placed in the treasury. It simply provides in said section 6 that the proceeds of such bonds is to be used alone in the construction of the highway.

Section 5 of said Act provides that the board of supervisors shall appoint three commissioners whose duty it shall be to have the management and supervision of the construction and maintenance of the road built under the provision of this act, and so far as the act is concerned

the money might just as well be placed in the bank to the credit of the commissioners, as it would be needed for immediate distribution in constructing the road.

Said section 6 does, however, provide that the board of supervisors shall levy an annual tax for the maintenance of said road and for paying the bonds and interest thereon, and this tax fund shall be paid into the county treasury and the treasurer is liable on his bond and shall keep a separate account thereof; but this provision with reference to the county treasurer clearly applies to the tax collected to pay the bonds and maintain the road and the only way for this money arising from the sale of the bonds to go into the treasury, for which the treasurer would be liable on his bond, would be by implication rather than by any direct statute.

In the case of *Monroe County v. Clar*, 25 Hun. (N. Y.) 282, the court held that where the duties of the county treasurer were increased by requiring him to handle an additional fund, and default arose in connection with the funds usually handled by him as well as any additional fund, his sureties, while not responsible for the default in the latter, were not discharged from liability as to the former.

The first case that I now recall in which this court declared these township funds to be county funds was the *Wilkinson County case*, 69 Miss. 865, and this court so declared these township funds county funds upon the language of the Act of the Laws of 1912, chapter 194. This Act was not passed until long after Mr. Hundley's term of office expired, and over four years after the bond in this case was executed; and the above decision was not rendered until November, 1915, and the conclusion of the court interpreting statutes passed long after the execution of this bond ought not to have the retroactive effect to fix liability on a bond executed years before the passage of these section statutes and the construction thereof by the court.

The court gave a decree against W. M. Hundley, treasurer, in this case for the obvious reason that there was no answer filed by him or defense made to the suit, and the question of his liability was never raised in the trial of the case. Neither are the sureties in this case bound by any litigation had in this matter in which the sureties were not a party.

All the litigation with reference to this failure of the Bank between other and different parties, and appellees in no way were connected therewith in any shape, form or fashion, and nothing that was adjudicated in those suits applies to the sureties. *Lipscomb v. Postell*, 38 Miss. 476; *Mann v. Yazoo City*, 31 Miss. 577.

SMITH, C. J., delivered the opinion of the court.

This is a suit upon the bond of W. M. Hundley, a former treasurer of Tishomingo county, Miss., to recover money of the county which came into the hands of the treasurer, and for which he failed to account.

Hundley assumed the office of treasurer of Tishomingo county in January, 1908, and in May, 1908, his bond was adjudged insufficient by the board of supervisors and an order was entered, directing him to execute a new bond, pursuant to which the bond here sued on was executed and approved. The bond recites:

"Whereas, the above bounden W. M. Hundley was duly elected to the said office of county treasurer general county funds of said county of Tishomingo on the 5th day of November, A. D. 1907, for the term of four years, from the first Monday of January, A. D. 1908:

"Therefore the condition of this obligation is such that if the said W. M. Hundley shall faithfully perform and discharge all of the duties of said office of treasurer general county funds and all acts and things required by law, or incident to the said office of county treasurer of Tishomingo county, Mississippi, during his continuance

therein, then the above, obligation to be void, otherwise to remain in full force and virtue."

When the bond was executed the duty of the county treasurer was to "keep the moneys of the county, and to disburse the same agreeably to law;" to "faithfully observe and discharge all the duties that may, from time to time, be required of him; and at the expiration of his office, he shall deliver to his successor all money, . . . belonging to the county." Section 978, Code of 1906 (section 4157, Hemingway's Code).

Chapter 149, Laws of 1910, approved March 3, 1910, provides for the construction by the boards of supervisors of one or more highways in one or more of the supervisors' districts of a county, and to issue and sell the bonds of the district or districts in order to obtain money with which to construct the highway or highways. Section 6 of this chapter provides that the treasurer of the county shall be the treasurer of the funds arising under the provisions of the statute and liable on his bond therefor.

In 1911 the board of supervisors of Tishomingo county issued bonds of one of the supervisors' districts of Tishomingo county under the provisions of this statute to the amount of thirty-five thousand dollars, the sale of which was negotiated for the county by the Tishomingo Banking Company. This banking company was not a county depository, but Hundley kept the county's money on deposit with it. The bonds were sold by the banking company to the Bank of Commerce & Trust Company of Memphis, Tenn., the cashier of which delivered to the Tishomingo Banking Company his check for the amount of the bonds payable "to the order of treasurer of Tishomingo county, Mississippi, when accompanied by a receipt of county treasurer on form supplied by us." This check was indorsed by Hundley, and the receipt referred to therein was signed by him, and both were delivered by him to the Tishomingo Banking Company, which delivered the bonds and cashed the check about three weeks before the expiration of Hundley's term of office. Hundley did not account to

his successor for the money received from the sale of these bonds, and claims not to have known that the sale had been consummated. The money received for the bonds was entered by the Tishomingo Banking Company on its books to the credit of the "Good Roads Fund District No. 1." This bank afterwards became insolvent, but the county succeeded in collecting from its receiver a portion of the money received by it for the bonds. This suit is to recover from the treasurer and his bondsmen the balance of this fund. There was a decree *pro confesso* against Hundley, but the bondsmen answered, denying liability, and on final hearing the bill was dismissed as to them, and the state has appealed to this court.

The contentions of the appellees are: First, the bond referred to covers the general county fund only, and not special funds of the character here in question; second, the bond does not cover duties imposed upon the treasurer after it was executed; third, the money arising from the sale of the bonds did not come into Hundley's actual possession and control; fourth, the money arising from the sale of the bonds, having been credited by the Tishomingo Banking Company to the credit of the good roads fund district No. 1, the right thereto passed to Hundley's successor by operation of law when he assumed the office.

First. The fact that Hundley's office was erroneously described in the bond as "county treasurer general county funds of said county of Tishomingo" will not relieve the appellees of liability thereon for the funds here in question, for the bond was subscribed by them and delivered and approved as the bond required of Hundley by section 3469, Code of 1906 (section 2807, Hemingway's Code), in order that he might continue to hold, and receive the emoluments of, the office of county treasurer, and when such is the case the bond is binding on every one who subscribes it, to the same extent that it would have been had the office of the principal obligor been properly described therein. Section 3463, Code of 1906 (section 2801, Hemingway's Code).

Second. The duty imposed on county treasurers of receiving and disbursing the money derived by the county from the sale of bonds issued under the provisions of chapter 149, Laws of 1910, is in no way different in kind from the duty of receiving and disbursing other moneys of the county, and an official bond is security, not only for the performance of the duties incumbent upon the officer when executed, but for such other duties, not different in kind, which may be thereafter imposed by the legislature upon him. *Denio v. State*, 60 Miss. 949; 22 R. C. L. 503; 27 Amer. & Eng. Enc. Law, 2d Ed., 542.

Third. It is immaterial whether the money paid by the Bank of Commerce & Trust Company of Memphis, Tenn., for the bonds came into Hundley's actual possession or not, for it was his duty to have obtained possession of the money before issuing a receipt therefor, and because of his failure to discharge this duty the Bank of Commerce & Trust Company obtained the bonds, but the county failed to obtain the money therefor, and the bond sued on covers the "discharge" of "all the duties that may, from time to time, be required of him."

Fourth. It is true that Hundley's successor had the right to collect this money from the Tishomingo Banking Company, but that does not relieve the appellees, for it was Hundley's duty to have collected it himself from the purchaser of the bonds, and to have paid it over to his successor.

The decree of the court below in so far as it dismissed the bill will be reversed, and a decree will be rendered here against the appellees for the money sued for, not to exceed in amount the penalty of the bond.

*Reversed, and decree here.*

MUTUAL LIFE INS. CO. OF NEW YORK v. VAUGHAN.

[88 South. 11. No. 21263.]

1. INSURANCE. *Delivery of policy by agent in violation of instructions to secure medical certificates held act of insurer.*

Where an insurance company executed a policy and sent it to an agent in this state to be delivered when the insured furnished a health certificate by one of its examining physicians, but no such provisions were in the policy, but in a letter of instructions, and the agent delivered the policy without complying with the instructions, the delivery by the agent is the act of the company, under section 2615, Code 1906 (section 5078, Hemingway's Code), and the policy is valid in the hands of the insured or his beneficiary, though no health certificate was furnished the agent or the company.

2. INSURANCE. *Insurer's liability depends on good health in fact where agent delivers policy without medical certificate; violation of rule by agent requiring medical certificate held not to invalidate policy.*

In such case where the policy stipulates that the policy should not be in effect unless the insured was in good health when the policy was delivered to and accepted by the insured, the question of liability depends upon the fact of good health, and if the insured was in fact in good health when it was delivered, it is not avoided because the company had a rule for the government of its agents that it should not be delivered without a medical examination by its examining physical, where more than sixty days had elapsed from the first examination, where such rule was not brought to the knowledge of the insured.

3. INSURANCE. *Acknowledgment of receipt of premium in policy held conclusive against insurer in favor of beneficiary.*

Where an insurance policy recited on its face, "In consideration of the annual premium of Fifty and 10/100 dollars, the receipt of which is hereby acknowledged," such recital is more than a mere receipt; it is contractual, and is conclusive against the company in favor of the beneficiary so far as liability depends upon payment of the premium is concerned. It does not prevent the company from holding the insurer liable for the payment of the premium. The rule is that, as between the insured

and the insurer for the purpose of collecting the premium, it is not conclusive but only *prima-facie* evidence of payment; but as between the beneficiary and the insurer it is conclusive, being contractual.

4. TRIAL. *Instructions must be considered as a whole.*

The instructions given by the trial court in a jury trial are to be taken and considered as a whole, one as supplementing or modifying another, and if when so construed they present the law fully and fairly, the court will not reverse for the giving of a single instruction for one party, though it may not be free from criticism.

APPEAL from circuit court of Montgomery county.

HON. THOS. L. LAMB, Judge.

Action by Mrs. Margaret B. Vaughan against Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

*Fulton Thompson, J. Harvey Thompson and Robert H. Thompson, for appellants.*

It is lawful for an insurance company to stipulate in any contract executed in its behalf that the provisions therefor cannot be waived by notice or representation unless given to or made by one of its principal officers. This applies in the case at bar especially:

(a) To the contractual terms of the application and the terms of the alleged policy providing that no agent or other person except the president, vice-president, a second vice president, a secretary or the treasurer of defendant company has power on behalf of the company to make, modify or discharge any contract of insurance to extend the time for paying a premium, to waive any lapse or forfeiture or any of the company's rights or requirements so as to bind the company by making any promise respecting any benefits under any policy or by accepting any representations or information. And it applies with full force.

(b) To the contractual terms of the application reading: "The proposed policy shall not take effect unless and

until the first premium shall have been paid during my continuance in good health and unless also the policy shall have been delivered to and received by me during my continuance in good health, with an exception negatived by the application as well as by uncontradicted testimony.

The authorities supporting our first above stated proposition are numerous, and we cite only a few of them. *New York Life Insurance Co. v. O'Dom*, 100 Miss. 219; S. C. 56 So. 379; *Odd Fellows, etc., Association v. Smith*, 101 Miss. 332; S. C. 58 So. 100; *Truly v. Mutual Life Ins. Co. of New York*, 108 Miss. 453; S. C. 66 So. 970; *Paine v. Pacific Mutual Life Ins Co.* (Eighth Circuit), 51 Fed. 689; S. C. 2 C. C. A. 459; *Powell v. Prudential Ins. Co.* (Ala.), 45 So. 208; *Reese v. Fidelity Mutual Life Association*, 111 Ga. 82, S. C. 36 S. E. 637.

There was no payment of the initial premium in this case. The offer by Feazell to extend time for the payment of the premium contained in the letter to Vaughan (the one he claims to have sent with the alleged policy and the reception of which by Vaughan is denied in a way by plaintiff) did not (aside from the requirement of a new health certificate) put the alleged policy in force. Under policies like the alleged one in this case an insurance solicitor unauthorized to grant an extension of time for the payment of a premium, who takes the note of the proposed insured for the premium does not thereby put the policy in force although he makes an actual delivery of it. Therefore, of course a verbal or written offer to extend the time for the payment of the premium without taking a note for it, accompanied by a conditional delivery requiring a health certificate is wholly ineffectual to put the policy in effect. *Batson v. Fidelity Mutual Life Ins. Co.*, 155 Ala. 265; S. C. —So. 578; S. C. 130 Am. St. Rep. 21; *Powell v. Prudential Insurance Co.* (Ala.), 45 So. 208; *Russell v. Prudential Life Ins. Co.*, 176 N. Y. 178; S. C. 98 Am. St. Rep. 656; *Cable v. United States Life Ins. Co.* (Seventh Circuit). 111 Fed. 19; *Ormand v. Mutual Life Association*, 96 N. C. 158; S. C. 1 S. E. 796.

Note that in the Alabama case, *Batson v. Fidelity, etc. Co.*, *supra*, the policy was offered in evidence and as well, the receipt of the solicitor of first premium, and yet the court held the peremptory charge asked by the insurance company should have been given, because the non-payment of the premium was established by testimony uncontradicted save by the recitals in the policy and the solicitor's receipt, these being insufficient to justify a refusal of the charge. In the case at bar no witness denied the testimony showing that the premium was unpaid and plaintiff's case stood alone on the recital in the, as we claim, undelivered policy, certainly not unconditionally delivered.

An applicant to an insurance company for insurance on his life is charged with notice of the contents of his written application which, by the terms of the policy (as in the case at bar) is made a part thereof; and if the application provides that the policy shall not be in force until the first premium is paid, the legal result is that the insured covenants, with the company directly and not through its agents, that the policy shall not be binding until such payment is made. *Russell v. Prudential Insurance Co.*, 176 N. Y. 178; S. C. 98 Am. St. Rep. 656; *Ormond v. Mutual Life Association* (N. C.), 1 S. E. 796. The case of *Whipple v. Prudential, etc., Insurance Co.*, 222 N. Y. 39, has no application to the case at bar, because defendant's manager (Dowdle) did nothing whatever that can be construed as a waiver of a new certificate of health and there is no pretence that he waived anything.

*McLean & Rowe*, for appellee.

The trial court committed no error in submitting the case to the jury, because of the obvious conflict of the testimony. It is the well settled rule in our state that all cases should be submitted to the jury, if there be conflict in the evidence, or if the facts be undisputed, and reasonable men may draw different conclusions therefrom. *Traut-*

*man v. L. M. R. R. Co.*, 95 Miss. 183; *N. O. M. & C. R. R. Co. v. Ann Cole*, 101 Miss. 173; *Landrum v. Y. & M. V. R. R. Co.*, 89 Miss. 388; *N. O. & N. E. R. R. Co. v. Brooks*, 85 Miss. 269; *Christian v. R. R. Co.*, 71 Miss. 237; *Nesbit v. City of Greenville*, 69 Miss. 452; *R. R. Co. v. Turner*, 71 Miss. 402; *Southern Ry Co. v. Floyd*, 55 So. 288; *Abernathie v. M. J. & K. C. R. R. Co.*, 97 Miss. 859; *Stephens v. R. R. Co.*, 81 Miss. 206; *Bell v. R. Co.*, 87 Miss. 234.

This court, in the case of *Sovereign Camp Woodmen of the World v. Wedgeworth*, 75 So. 565, decided June 11, 1917, affirmed a judgment of a jury in a *per curiam* opinion, and upon examination of the record in that case, we find that the question of the payment of dues for three months on the part of the insured was submitted by the trial court to the jury.

The case at bar is identical. The policy sued upon acknowledges receipt of the initial premium due thereon, and was introduced in evidence. The appellant claimed the premium was not paid. The court submitted the case to the jury, and the jury found in favor of the plaintiff. All we ask is that the court shall affirm this verdict upon the same ground as in the *Wedgeworth case*, *supra*, the number thereof being 19274 upon the Docket of this court.

Counsel for appellant strongly rely upon the case of *Batson v. Fidelity Mutual Life Ins. Co.*, 155 Ala. 265, 130 A. S. R. 31, as authority for the argument that the non-payment of the premium, being established by the testimony uncontradicted save by the recitals in the policy and the solicitors receipt therefor, was established absolutely. But, this *Batson* case is not at all in point with the case at bar, for the reason that, although the receipt of the premium was acknowledged in *Batson's* receipt, still the receipt itself showed on its face that a note had been given for the premium and also stipulated that the failure to pay the note thus given for the premium at its maturity would operate to end and determine the policy. Here was a writing showing that the premium had not been paid.

In the case at bar we have receipt of the premium acknowledged in the policy, and an attempt by the mouth of the agent. Mr. Feazell, to show the premium had not been paid. The case of *Powell v. Prudential Life Ins. Co.* (Ala.), 45 So. 208, cited by counsel, is not in point, for the reason that there was not even a manual delivery of the policy to the insured at all in that case, and the insured died while the policy was in possession of another, who delivered it to the father of the insured after the death of the insured. The insured was taken fatally sick before there was ever any pretense of a delivery of the policy to any one, and all the evidence showed conclusively that the policy was not delivered until after the death of the insured.

Likewise, the case at bar is easily distinguishable from *Russell v. Prudential Life Ins. Co.*, 176 N. Y. 178, cited by counsel for appellant on the same proposition. In *Russell's* case, it is to be observed that the policy opens up with this provision, to-wit: "In consideration of the application of this policy, which is hereby made a part of this contract, and of the quarterly annual premium of seven and two-one hundredths dollars, which it is agreed shall be paid to the company in exchange for its receipt on the delivery of this policy," etc. (See page 663 of 98 A. S. R. where the case is also reported.)

Whereas, the policy in the case at bar opens up thus: "The Mutual Life Insurance Company of New York, in consideration of the annual premium of fifty and 10/100 dollars, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each twenty-third day of September hereafter," etc.

The opinion of the court in *Russell's case*, *supra*, makes for us the distinction and is authority for our position that the case at bar is one that is not governed by the *Russell* case but by the other line of decisions in the state of New York, headed by the case of *Stewart v. Union Mutual Life Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, in which it was held that the right of insurance companies to re-

strict their liabilities for acts of their agents, by inserting clauses in the application and policy restricting the powers of agents, must be recognized unless by so doing their contracts would become tainted with fraud, and in such case it will be presumed that the waiver was intended rather than the fraud. See at bottom of page 660 of 98 A. S. R.

We contend that the case at bar is one of those cases, wherein the company is estopped from setting up non-payment of the first premium after delivery of the policy, in which payment of the first premium is acknowledged, such as in the policy involved in this suit. Furthermore we contend that the agent, Mr. Feazell, who had the power to solicit insurance, deliver the policy and collect the first premium, waived for his company the condition imposed by his company requiring and instructing him not to deliver the policy until a satisfactory health certificate should be obtained by Mr. Feazell, the reason for this contention being that this condition was not a part of the policy, nor of the application therefor, and was uncommunicated to the insured, according to the finding of the jury.

Our own court is authority for this position. *Fidelity Mutual Life Ins. Co. v. Elmore*, 71 So. 305; 14 R. C. L. 968, sec. 141; *Britton v. Metropolitan Life Ins. Co.*, 165 N. Car. 149; *Illinois Central Life Ins. Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251; *Trager v. Louisiana Equitable L. Ins. Co.*, 31 La. Ann. 235; *Dobyns v. Bay State Ben. Asso.*, 144 Mo. 95, 45 S. W. 1107; *Kendrick v. Mutual Ben. Life Ins. Co.*, 124 N. Car. 315, 32 S. E. 728, 70 A. S. R. 592; *Harrington v. Mutual Life Ins. Co.*, 21 N. D. 447, 131 N. W. 246, 34 L. R. A. N. S. 373; *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344; *Kline v. National Ben. Asso.*, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703.

In all these cases the doctrine of estoppel is applied, and they all hold that, as against the beneficiary, the insurance company is estopped to deny the payment of the

premium acknowledged in the policy. Furthermore, this rule is placed on the ground of public policy.

*Teutonia Life Ins. Co. v. Anderson*, 77 Ill. 384. Upon this question see also the note on "conclusiveness of acknowledgment of receipt of premium in Life Insurance Policy," Ann. Cas. 1915 D. 366, where it is stated that the doctrine that an acknowledgment of the receipt of the premium in a life insurance policy conclusively estops the insurer from averring or proving its non-payment for the purpose of denying the existence of the contract of insurance, is clearly distinguishable from cases in which the insured gives his note for the premium, and agrees that if his note is not paid at maturity, the policy shall become void.

Regarding the health certificate. Surely it is the law that the requirement of the insurance company as to the health certificate in this case cannot operate to defeat recovery upon the policy, unless it be satisfactorily shown that the insured had notice of such requirement. There was no notice to the insured of such requirement in the application or in the policy. The insured is not presumed to know the rule of the company on that score. Knowledge must be brought home to the insured that such a rule does exist, and that the health certificate must be furnished by him. *Kendrick v. Mutual Ben. Life Ins. Co.*, 124 N. Car. 315, 32 S. E. 728.

In the case at bar the policy was delivered by mail, and the jury found that it was delivered by mail, unconditionally, for that question was submitted properly to the jury by the trial court. When the policy was actually delivered to the insured, being in good health at the time of such delivery, as was clearly shown, he had a right to retain the policy under the belief that all that was required of him was that he be in continued good health. After actual delivery of the policy, the company is estopped, in the absence of fraud, to assert that the policy is void because of ill health of the insured. 25 Cyc. 721; *Fidelity Mutual Life Ins. Co. 1. Elmore*

[125 Miss.]

Brief for Appellee.

(Miss.), 71 So. 305. To state it another way: the provision in the policy that it should not be valid, unless the premium is paid while insured is in good health was waived by the delivery of the policy to the insured by Mr. Feazell, the agent of the company having authority to take the application, collect premium, and especially detailed to deliver the policy. 25 Cyc. 730, B. 14, R. C. L. 900, citing the excellent notes to the case of *Stephenson v. Allison*, 138 A. S. R. 62; and we especially call the court's attention to pages 61 and 62 of said notes, in which a full discussion of the waiver of both payment of premium and of health is had, showing that the weight of authority is in favor of our propositions of law stated above on these matters.

This is not in conflict with the decision in the case of *New York Life Ins. Co. v. O'Dom*, 56 So. 379, cited by counsel for appellant, for the reason that in the case at bar we have not the question of a forfeiture, by reason of the extension of time for payment of premium, or the waiver of any of the provisions of the policy, or any right or requirement of the insurance company, known to the insured, or with which the insured should be charged with notice, as in the O'Dom case. There is no attempt here of the agent, Mr. Feazell, to do any of the forbidden things, which could be done only by the president, vice-president, a second vice-president, a secretary, or the treasurer of the appellant company, of which the insured had notice. There is no clause or statement in the application or in the policy demanding any kind of health certificate to be furnished by the insured before the policy should take effect, and in accepting and retaining the policy, the insured violated none of the contractual terms of the application, or of the policy. The insurance company trusted Mr. Feazell, the agent, with the delivery, detailed him to deliver the policy, and surely the insurance company is bound by the manner in which the agent delivered the policy, which was unconditional.

The case of *Truly v. Mutual Life Ins. Co. of New York*, 108 Miss. 453, cited by counsel for appellant, has no application whatever, because that case was decided on the question of the attorney of the soliciting agent to vary the expressed terms of the contract, and it was held therein, as of course, that only a general agent could do such a thing as vary the terms of the policy. The health certificate in our case is entirely a different thing, because it was governed by a secret rule of appellant, and was uncommunicated to the insured, and the insured had a right to rely upon the policy itself, he being in good health at the time it was delivered to him by the authorized agent of appellant unconditionally. This same health certificate was the only requirement made by the company, when the policy was sent out from the Home Office for delivery, as already shown by the letter of the appellant accompanying the policy, and this requirement was not made known to the insured.

ETHRIDGE, J., delivered the opinion of the court.

This is an appeal from a judgment of the circuit court against the appellant for two thousand dollars. The facts briefly stated are as follows: In June, 1918, plaintiff's husband, Albert Truly Vaughan, applied in writing to the appellant for two five-year term policies of life insurance on his life, in the sum of two thousand dollars each, payable on his death to his wife. The application contained, among other things, a provision that the policy should not take effect unless and until the first premium shall have been paid during the applicant's continuance in good health, and unless also the policy shall have been delivered to, and received by, the applicant during his continuance in good health, except in case a conditional receipt shall have been issued as hereinafter provided. The applicant also agreed in the application that no agent or other person except the president, vice president, a second vice president, a secretary, or the treasurer of the insurance

company had power on behalf of the company to make, modify, or discharge any contract of insurance, to extend the time for paying a premium, to waive any lapse or forfeiture or any of the company's rights or requirements, or to bind the company by making any promise respecting any benefits under any policy issued under the application, or by accepting any representation or information not contained in the written application.

The application, with the medical examination, was transmitted to the home office of the company, and the company declined to issue the policy on the plan requested, but did issue two policies of ordinary life insurance for two thousand dollars each and transmitted them to the Mississippi agent for delivery. Vaughan declined to accept the policies tendered and they were returned and canceled. But thereafter the local agent induced Vaughan to accept one of the policies tendered by the company, and the company was notified to this effect, and made out and sent to its state manager a policy for two thousand dollars on the life of Vaughan, which policy on its face recited, "In consideration of the annual premium of fifty and 10/100 dollars, the receipt of which is hereby acknowledged and of the payment of a like amount upon each Twenty-third day of September hereafter until the death of the insured." Accompanying this policy was a letter to the company from its state manager, and also a blank application with blanks for a medical report. The letter to the state manager instructed him to deliver the policy on procuring a satisfactory certificate of health, or, to quote more exactly from the letter, "Policy No. 2503511 is forwarded, herewith, but before delivery you are to procure a satisfactory certificate of health." The state manager of the insurance company, on receipt of the policy with the inclosed blanks and letter, sent to the local agent the policy and blank application or certificate with the following letter:

"I send you herewith Policy No. 2503511. Amount \$2,000. Prem. \$50.10. Policy of Albert Truly Vaughan

is forwarded herewith, but before delivery you are to procure a satisfactory certificate of health. Please acknowledge receipt."

The local agent testified that he inclosed the policy, with the blank application for medical examination, with a letter therein addressed to Mr. Vaughan at Jackson, Miss., a copy of the letter reading as follows:

"They were rather slow about it, or else I overlooked matter for a time. But anyway I wrote second time and am pleased to hand you herewith policy as suggested. Note that I have had date moved up to date, as I do not think you should pay for about ninety days without having had the protection and in this way second premium not due until Sept.—Oct. 23, 1919, instead of June, 1919, as if original sent out. Necessary, however, to have enclosed form signed and witnessed by the examiner, Dr. Hunter. Please take this form to him on receipt of same, fix it, and mail to me. You can use thirty days if you care to on payment this premium from date of this form completion by Dr. Hunter. Amount for first year's premium twenty-seven dollars and five cents. This includes two dollars health certificate fee to the examiner. If you prefer settle this fee with the doctor and remit me twenty-five dollars and five cents premium. Trusting this satisfactory and to hear from you in due course," etc.

The deceased, Albert Truly Vaughan, died some days after the mailing of this policy, and after its receipt by him.

It appears from the plaintiff's testimony that she, in company with her husband, the deceased, went to the post office at Jackson, Miss., on their way to a picture show at night, and that her husband received the letter and opened it in her presence, the envelope containing only the policy of insurance, and containing no form nor letter nor instructions of any kind. That she examined the policy in the envelope and saw there was no inclosure with the policy. She testified that Vaughan was in good health at the time. A few days thereafter Vaughan went to New Or-

leans, and returned and developed a case of influenza, and died within a few days. The widow, the plaintiff, notified the company of the death, and requested forms to make out proof of death, which the company refused to furnish, contending that it had not delivered the policy and that the policy was not an obligation against the company, whereupon suit was brought upon the policy. The policy was attached to the declaration, and the application of the deceased for insurance upon which the policy was issued is made a part of the record.

The defendant filed the general issue, and also special pleas. The general issue denied that it undertook or promised, or that it was indebted in the manner and form as charged in the plaintiff's declaration. The special pleas, of which there were three, set forth that the said policy was never executed or delivered setting forth that the application made in June, 1919, was rejected by the company as applied for, and that the company, on the written medical examination or report of the medical examiner, declined to issue the policy as applied for, but tendered to the deceased ordinary life plan policies for said amount, which Vaughan declined to accept; that afterwards, in August, 1918, said Vaughan made known to the defendant that he was willing to accept one policy for two thousand dollars on ordinary life plan, and requested that such policy be executed, and thereupon defendant agreed to write such policy on his life, if he would furnish a new medical examiner's report showing his then state of health and physical condition to be as good as it was when the previous medical examination was made, and that the medical examiner's report was a condition precedent to the execution of any policy of insurance by the defendant on the life of the said Vaughan; that on the 23d day of September, 1918, the defendant prepared in writing in form a life insurance policy on Vaughan's life, the paper printed and written sued upon in this case, and transmitted the same to its manager, with instructions that it should not be delivered before receiving from him a satis-

factory certificate of health and report of the medical examiner showing his health and physical condition at the time, and that the said policy by its terms required as a condition to its validity that the first premium of fifty dollars and ten cents should be paid; that said Vaughan should be in good health at the time of its delivery to him; that its said manager forwarded the policy and directions to the local agent with instructions in writing not to deliver the policy to Vaughan until Vaughan should deliver to defendant a satisfactory certificate of health and a medical report; that said certificate was never delivered, and the premium was never paid. Issue in short was joined on these special pleas.

On the trial the local agent testified that he mailed the policy, together with the letter and forms above referred to, to the deceased Vaughan; that he had previously instructed Vaughan that it would be necessary to obtain a health certificate from the company's examining physician. Dr. Hunter. He also says that he had no authority to so deliver the policy. Various rules of the company furnished to its agents by the appellant were offered in evidence, limiting and restricting the authority of the agents in various ways in the discharge of their duties.

It was the duty of the agent to solicit policies and to collect premiums, and also to deliver policies. The trial court submitted the issues to the jury under instructions for the plaintiff and defendant. It gave one instruction for the plaintiff which reads as follows:

"The court instructs the jury for the plaintiff, if they believe from the evidence that the insurance policy introduced in evidence in this case was duly and legally issued by the regularly constituted authorities of the defendant company, the Mutual Life Insurance Company of New York, upon the life of Albert T. Vaughan, on the 23d day of September, 1918, and that said policy was duly received by the said Albert T. Vaughan while in good health, as testified to by the plaintiff, Margaret B. Vaughan, and that no other papers, letters, or written statements per-

taining to said policy were received by said Albert T. Vaughan with said policy, and that no other conditions, or requirements affecting said policy were ever communicated to said Albert T. Vaughan, and that said Albert T. Vaughan died on the 18th day of October, of influenza and pneumonia, then the jury will find for the plaintiff an amount not to exceed the face value of said policy, to wit, two thousand dollars, together with six per cent. interest per annum thereon from March 12, 1919, to the present date, to wit, the 15th day of October, 1919."

For the defendant the court instructed that if the jury believed the agent delivered the policy in violation of instructions of the defendant they should find for the defendant.

The local agent testified that no health certificate was ever delivered to him. It appears from the evidence that Dr. Hunter was the physician who examined applicants for the company. He was not introduced as a witness as to whether the deceased was ever re-examined by him, but the local agent testifies that no medical certificate was ever furnished to him of any such examination.

It is insisted that there was no delivery of the policy in such sense as to bind the company. It was also insisted that there is no proof of the payment of the premium under the terms of the policy and the application for the policy, and the officers of the company whose depositions are taken, who have charge of this department of the company's business at its home office, testify that no premium was ever paid, as also does the local agent, while the plaintiff testifies that she has no knowledge of the payment of the premium. It will be first necessary to determine whether the policy was delivered, and, if it was delivered, it will then be necessary to determine the effect of the receipt contained on the face of the policy upon this question.

In *Stewart v. Coleman & Co.*, 120 Miss. 21, 81 So. 653, we construed section 2615, Code of 1906 (section 5078, Hemingway's Code), and held that the agent delivering a

policy of insurance under that section of the code was the agent of the company for that purpose, and gave effect to a delivery of a policy in the same manner and to the same extent as if it had been delivered by the principal. The section above referred to precludes an insurance company from delivering a policy through an agent in this state, and then avoiding the effect of such delivery. In the present case the delivery must be determined by the same rule that would govern had the proper officers of the company made the delivery. In sending a policy to an agent in this state for delivery, with instructions as to what to require, the instructions will not be binding upon the beneficiary in the policy, unless the beneficiary or the insured had knowledge of the conditions contained in the instructions to the agent. If the agent violated his instructions, without knowledge or acquiescence on the part of the beneficiary, or on the part of the insured, then the company must bear the consequences of the agent's violation of his instructions so far as the beneficiary and the insured are concerned. Under our statute, making the delivery by an agent a delivery by the principal, a contract becomes a Mississippi contract, and provisions in the rules or instructions to the agent in conflict with the statute will not be allowed to prevail.

The company issued the policy upon a medical examination conducted by its own officers, and if it intended not to deliver the policy until an additional health certificate was furnished it should have withheld the policy until that was received. The provision in the policy is that the proposed policy should not take effect unless the policy should have been delivered to, and received by, the insured during the continuance of good health. The question is then to be determined whether the applicant was in good health at that time. The health certificate, if one was furnished, is mere evidence of the fact of good health, and if the company delivered the policy when the insured was in good health, without requiring the certificate to be delivered prior to the delivery of the policy, it waived this

provision or requirement, and it is immaterial that the waiver occurred through the default of the agent or whether it was the default of the principal. The company cannot withhold from the insured the benefit of the policy which it delivered without bringing the conditions to the knowledge of the insured or the beneficiary. The proof on this point is conflicting. The plaintiff testifies positively that no papers other than the policy itself were inclosed in the envelope received by her husband, the insured. The agent testifies positively that he mailed the application and letter to the insured in the same inclosure that contained the policy. It is urged in argument that the inclosures may have gotten lost in the mail, and that this possibility would prevent a conflict of evidence upon the point involved. There is no fact in the record which would warrant the presumption that the inclosures were lost in the mail. There is no proof that the letter was opened, or rifled, or anything taken therefrom. Therefore the evidence upon this point was for the jury, and the jury resolved it in favor of the plaintiff.

We are next called upon to consider the effect of the receipt of the money contained in the face of the policy.

In *Britton v. Metropolitan Life Ins. Co.*, 165 N. C. 149, 80 S. E. 1072, Ann. Cas. 1915D, 366, it was held that an acknowledgment in a life insurance policy of the receipt of a semiannual premium is not a mere receipt, but a part of the contract, in so far as the insurer's right to forfeit the policy is concerned, and estops the insurer to claim a forfeiture because of the parol contract between the insured and the insurer's agent that the premium should be paid quarterly, pursuant to which agreement only payment of the quarterly premium at the beginning of the insurance term, instead of a semiannual premium, was made. It was held in this case, and by numerous authorities cited therein, that the receipt in such case is not a mere receipt which may be contradicted by parol proof. In the case note to this report to the Ann. Cas. 1915D, 366, the learned editor of this series says:

"The reported case is in accord with the weight of authority in holding that where a life insurance policy is delivered unconditionally, an acknowledgment in the policy of the receipt of the premium, estops the insurer in the absence of fraud to contest the validity of the policy on the ground of nonpayment of the premium."

And a large line of authorities are cited to sustain this statement. The rule seems to be that, as between the insurer and the insured for the purpose of collecting the premium, such receipt is not conclusive but is only *prima-facie* evidence of payment, but, as between the beneficiary and the insurer, a receipt is conclusive, being contractual. We think the rule is amply supported by authority, and so the policy is not void because the premium was not paid before delivery, if in fact it was not paid, which seems to be proven, the insured being dead and unable to testify as to this fact.

It is insisted that the instruction above set out for the plaintiff is erroneous, and the judgment should be reversed for that reason. We do not undertake an analysis of the various grounds of objection to this instruction; nor does it, when considered in connection with the instructions given for the defendant, omit any legal requirement. Taking the instructions as a whole, one as supplementing the other, we think the law was announced as favorably to the defendant as it could be. Indeed, the plaintiff was required to meet more than the law imposed upon her.

*The judgment will be affirmed.*

BELT *et al* v. ADAMS.

[87 South. 666,]

1. JUDGMENT. *Filing bill to cancel title acquired under vendor's lien foreclosure held a direct and not a collateral attack.*

Where a bill was filed to cancel a title acquired under a vendor's lien foreclosure suit in which it was alleged that such judgment was void for many reasons set forth in the bill, and where the former pleadings and proceedings were attached as exhibits to the bill, and where it was alleged that the complainants, who were minor defendants in the former suit, did not have notice in said former suit, such attack is a direct attack and not a collateral attack, although the complainant in the former suit was not made a defendant in the last suit; it being alleged that the complainant in the former suit was paid in full before the decree was rendered in the first suit.

2. PARTIES. *Nonjoinder of party defendant to be raised by plea, and not by demurrer; plea should suggest party to be joined and necessity therefor.*

In such case the nonjoinder of a party should be raised by plea and not by demurrer. The general rule is that the nonjoinder of a party is to be raised by plea suggesting the party to be made a defendant and the necessity for the party omitted to be joined.

3. EXECUTORS AND ADMINISTRATORS. *Purchase by executor at sale of property of testator to pay debts invalid unless unreasonable delay in assertion of rights.*

Where an executor is charged under the will of the testator with the duty of paying debts, and who, having funds to pay the debts, permits the property to be sold, and buys at such sale, neither the executor nor those buying with notice of such facts will be permitted to hold such property against those entitled thereto, unless after notice of such sale there is unreasonable delay in asserting such right to set aside the sale.

4. VENDOR AND PURCHASER. *Wills. Foreign will ineffective as conveyance until probated, when it relates back; purchaser with notice of will takes subject to probate.*

A will made and probated in a foreign state has no effect as a conveyance as to property in this state until the same is probated.

## Opinion of the Court.

[125 Miss.]

But when it is probated here it will relate back to the death of the testator and be given effect unless the property or some of it has been acquired in good faith for value by a person without notice of the existence of the will. A person buying with notice of the will takes the property subject to the will being probated.

5. WILLS. *No statute of limitations as to probate of will.*

In this state there is no statute limiting the time in which a will may be probated. *Fatheree v. Lawrence*, 33 Miss. 585, cited.

On suggestion of error. Suggestion of error overruled. For former opinion, see 86 So. 584.

ETHRIDGE, J., delivered the opinion of the court.

This cause was considered and an opinion written reversing and remanding the cause in *Belt v. Adams*, 86 So. 584, in which opinion a full statement of the case is made, and as there is no complaint made in the suggestion of error as to the statement of the case in the former opinion, it is referred to for information as to the facts.

A suggestion of error was filed, challenging practically every proposition of law as announced in the former opinion.

The case comes here on bill and demurrer, and the opinion is to be considered and understood in connection with the allegations of the bill to which a demurrer was sustained, by which, of course, the allegations of the bill stand confessed.

The former opinion proceeded upon the theory that the bill constituted a direct attack upon the suit filed by Mrs. Jenkins referred to in the former opinion. It is insisted that this suit is a collateral attack because Mrs. Jenkins and her heirs were not made parties to the suit, and that this was necessary in a suit not making a direct attack upon the judgment.

The bill in the present case alleged that prior to the sale in the former suit Mrs. Jenkins was paid in full and her claim satisfied, which of course, if true, removed any in-

terest she may have growing out of the present litigation. The general rule, however, is that the nonjoinder or misjoinder of parties must be raised by plea, and if the defendants deem the joinder of Mrs. Jenkins, or her heirs, necessary, they may set forth in their pleadings a suggestion of their necessity and raise the question by plea.

The defense of the defendants in the present case is principally grounded upon the statutes of limitation and pleadings of estoppel, or questions involving estoppel, both of which are affirmative defenses which must usually be set up either by plea or answer, as must likewise the question of the *bona fides* of the defendant in acquiring the title.

It may not be true that the complainants were not served with process in the former suit, but the bill in the present case alleges that they were not and that they had no knowledge of such suit until very recently. The pleadings in the former suit on the part of the complainant therein set forth by allegation that Belt, to whom the complainant's intestate had sold the property there described, has died testate in the state of Georgia, and that Mrs. Belt was executrix in his will, and that the children were minors.

It is true that the bill did not set forth the will either in detail or in substance, but it did allege enough facts with reference to the will to show its existence and where information could be obtained. The will was probated in Mississippi only after the death of the executrix, who was also, under the terms of the will, the owner of the estate for life, charged by the terms of the will as executrix with the duty of paying the testator's debts. An investigation might have disclosed all the facts charged in the bill. If it would not have done so, that is a matter of defense and proof.

In the former opinion we pointed out many defects in this former suit. Indeed, it may be with propriety denominated "a tragedy of errors." These errors, to which attention was called, each of which we think is a warn-

ing to purchasers tracing their title to this proceeding to pause, reflect, beware. All of the defects pointed out in the former opinion were not such defects as would render the sale absolutely void, but they were such defects as ought to cause a reasonably prudent person to investigate before buying this property.

The bill filed was for a considerable sum of money and sought to establish a lien upon a large quantity of land. The fact that the sale made under the purported decree was for a mere trifle compared with the value of the land and compared with the amount of the debt is, we think, such a circumstance as might cause a prudent man to make some inquiry.

The further fact that the sale was made by a commissioner who was also attempted to be made guardian *ad litem* for the minors, and that the lands sold under such sale was bought by the executrix, who was charged by the terms of the will with the duty specifically of paying the debts, and who was given by the terms of the will a life estate in the property, seems to us to suggest bad faith and fraud.

It is true that it is not every sale at which an administrator or executor might buy to the prejudice of the heirs or wards, would render such sale void. But if the parties are minors and are in court, they would have the right at any time during their minority or within the given period thereafter to repudiate such sale and hold the purchaser a trustee, even though such purchaser paid full or fair value for it at the time of the sale.

The rule as applied to that state of case is well stated in the case of *Memphis Stone & Gravel Co. v. Archer*, 120 Miss. 453, 82 So. 315, where it is said:

"The rule of equity which prohibits purchases by parties placed in a situation of trust or confidence with reference to the subject of purchase is not confined to trustees or others who hold the legal title to the property to be sold; nor is it confined to a particular class of persons such as guardians, trustees or solicitors, but it is a rule

which applies universally to all who come within its principle; which principle is that no party can be permitted to purchase an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use."

In that case the purchaser was a grandfather and next friend of his seven year old grandchild in a partition suit and bought the land at a commissioner's sale at a price which was then its reasonable value, and it was held that the sale was not void but voidable at the minor's election within the time allowed to infants to exercise such right, and that neither the grandfather nor those claiming under him with notice will be heard to say that he did not know that a good title would not be obtained by such purchase.

If in the present case the proof should show that the minors were legally in court, and that the debt was not paid off, and that the land was sold after a fair opportunity on the part of the public to bid, then in such case they would have to act within the time prescribed by the law for them to bring an action to assert their rights. And if the purchaser bought in good faith, with no notice of facts to charge them with notice of the bad faith of others, a proceeding might be upheld. But when a minor has no knowledge of the transaction and a fraud is perpetrated upon such minor in such a proceeding, the statute of limitations would not run until he either learned of the fraud or could have learned of it by the exercise of reasonable diligence, and what is reasonable diligence is a question of fact in most cases depending upon the particular circumstances existing in the particular case. This is expressly provided in section 3109, Code of 1906, Hemingway's Code, section 2473.

It is said again that the will was not probated within the state of Mississippi, and that until it was probated it had no legal effect, and that proceedings occurring or tak-

ing place will be protected, notwithstanding such proceeding may thwart or annul the will or some of its provisions.

It is true that a will does not become effective as an instrument of conveyance in this state until it is probated in the state; but it was stated by Judge Woods, speaking for the court in *Pratt v. Hargreaves*, 76 Miss. 955, 25 So. 658, 71 Am. St. Rep. 551, that when a will was probated it related back to the death of the testator.

While it is true that a sale made under a judicial proceeding in ignorance of the will will protect a *bona-fide* purchaser, as held in the case of *Virginia Trust Co. v. Buford*, 86 So. 356, and 516, it is also true that a purchaser buying with knowledge of the will and of its provisions cannot assert a claim that would defeat the will. To so hold would be to place within the power of the heirs and other persons having knowledge of a will power to defeat a testator's purpose and intention by the simple expedient of concealing the will for a time, and then instituting a proceeding for the sale of the property, at which sale some person having knowledge of the will could buy the property and receive title. It is only a *bona-fide* purchaser for value who will be protected against a will by the courts in such cases.

There is no statute of limitation in this state on the subject of probation of wills as was held by this court in *Fatheree v. Lawrence*, 33 Miss. 585. In that case a period of about twenty-three years elapsed between the death of the testator and the probation of the will, yet the court gave effect to the will in that case.

In the case of *Reid v. Bengé*, 112 Ky. 810, 66 S. W. 997, 57 L. R. A. 253, 99 Am. St. Rep. 334, 57 L. R. A. 253, the Kentucky court held that the negligence of placing a will so that its existence is not known for several years after the testator's death and the laches of the devisee in not producing it will not estop him from asserting his claim against one who has acquired title from the heir at any time before the right to probate or register

the will is barred, Kentucky having a statute fixing a limitation on probating wills at ten years, and the will having been probated within the period of ten years. In the course of its opinion in that case the court said:

"It may be said that a person may speak a falsehood or act a falsehood, but, if he does no act, and remains silent, he cannot be charged with fraud or be estopped without he knew the truth when his nonaction or being silent is said to have induced another to act to his own injury."

There is a note upon the subject of the effect of delay in probating wills in which numerous phases of the subject are discussed.

In the case of *Re Estate of William Walker*, 160 Cal. 547, 117 Pac. 510, 36 L. R. N. (N. S.) 89, the California court held that the distribution of an estate as intestate property will not prevent a probate of a subsequently discovered will as a basis for establishing the right of the legatees against those in whose possession the property has gone.

Of course, there may be elements of estoppel which would prevent the complainants recovering the property in this suit, but the allegations of the bill do not present such facts as would warrant the court on the face of the bill in denying relief to the complainants under this doctrine.

According to the allegations of the bill, the debt to Jenkins was paid off and a receipt taken from the solicitor of the complainant in that suit showing the debt to have been paid, and they alleged that they were without notice of the sale to their mother, the mother being entitled under the will to a life estate with right of possession during her life and with the right to convey such estate to others during the period of her life, and the will having directed her to pay the debts, and it being alleged that she had ample funds with which to do so, would make a case where the complainants might rely upon her good faith and the rightfulness of the possession in

her vendees until actual notice of the claim or knowledge of such facts that would cause a reasonably prudent person to learn of such facts.

Much has been said in this case and in other cases recently before us about destruction of titles. The court neither makes nor destroys titles, at least intentionally. The title always rests with some person. The court tries to discover who has the title, legal or equitable, and to protect the title in whatever person it may exist. It has never felt called upon to protect a particular class of persons at the expense of another class of persons. All litigants have equal rights, and the court will, to the best of its ability, administer the law irrespective of persons.

It may be that the proof when the case is developed will show the equities to be with the defendants, and we doubt not that the learned chancellor will apply the correct legal principles to such facts as may be disclosed by answer and proof.

The suggestion of error is overruled.

*Overruled.*

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O'KEEFE *et al.* v. McLEMORE.

[87 South, 855, No. 21708.]

1. LANDLORD AND TENANT. *Stipulation for attorney's fee in rent note not enforceable in attachment for rent.*

Where a tenant gives a rent note which contains an agreement to pay an attorney's fee in case the note is not paid at maturity, and it is placed in the hands of an attorney, and where an attachment for rent is sued out, followed by replevin and trial in accordance with statutory proceedings, at attorney's fee cannot be allowed in such suit to the landlord. The statute giving the landlord a lien and providing for proceedings to enforce it does not include an attorney's fee, and the products grown by the tenant are not impressed with a lien for an attorney's fee,

though stipulated for in the rent note, and the allowance of an attorney's fee in such case constitutes reversible error.

2. EVIDENCE. *Landlord and tenant. Parol evidence not admissible to vary deed conveying leased premises without reserving rent.*

Where a landlord conveys the leased premises by deed without reserving the rent in the deed, the rent passes to the grantee, and parol evidence is not admissible to show oral understandings and agreements between the parties contrary to the legal effect of the deed.

APPEAL from circuit court of Washington county.

HON. S. F. DAVIS, Judge.

Action by J. B. O'Keefe and others against G. B. McLemore. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

*R. B. Campbell*, for appellant.

The conveyance of the leased premises to C. R. Smith carried with it the rent for which the attachment, in this case was sued out; and the court erred in overruling the plaintiff's motion to exclude the evidence, and in refusing to direct a verdict for him, as requested in his Instruction No. 1.

The rule is well established that rent is an incident to the reversion, and that an unqualified grant of the reversion by the landlord passed to the grantee all rent to accrue. While the landlord may sever the rent from the reversion, the fact that the rent is evidenced by a note, or notes, will not, of itself, work a severance of the rent from the reversion. 18 Am. & Eng. Encyclopædia of Law (2 Ed.), 280 & 285; 24 Cyclopædia of Law and Procedure, 1172; *Watkins v. Duvall*, 69 Miss. 364; *Bowdre Bros. & Co. v. Sloan*, 69 Miss. 369. And according to this last case, the fact that the rent note had been assigned to another made no difference.

When those cases were decided, the right to sue out an attachment was limited to the landlord, his executors

or administrators, and the right was given to his executors or administrators only for rent in arrear, at the time of his death, or for rent to accrue during the year of his death, because, as to rent in arrear, his executors or administrators were his proper representatives of all choses in action, and as to rent accruing during the year of his death the statute made the same assets, and payable to his executors or administrators.

By section 2501 of the Annotated Code of 1892, the right to attach for the rent was given to the lessor, his executors, administrators, or assigns; and it was held in *Coker v. Britt*, 78 Miss. 583, that said section of that code secured the right to an assignee of the rent note or claim, using the following language:

"Prior to 1890, rent was an incident of the reversion, and the assignee of the rent note could not distrain for its payment, but by chapter 51, Acts of 1890, any assignee or holder of a claim for rent was given the remedy of distress before that time exercisable only by the lessor or the assignee of the reversion, and this remedy is also secured to the assignee of the rent claim by section 2501 Annotated Code."

That section of the code is the same as section 2838 of the Code of 1906, which governs the instant case; and, but for the rule that a statute, which has been construed, and afterwards adopted, is presumed to have been adopted as construed by the court. I would seriously contend that the court in the *Coker* case erred in holding that said section of the code was, in effect, the same as chapter 51 of the Acts of 1890, in that the word assigns as used in said section, embraced one who was assignee merely of the rent note or claim; but as I am debarred of any such contention by the rule mentioned, I take it to be the law, in consequence of that decision, that an assignee of the rent note or claim may sue out an attachment therefor, under the statute.

However, I am not debarred from contending that the court erred in that case if it meant to say that since 1890 rent was no longer an incident of the reversion.

As to that the language of the court was as follows: "Prior to 1890, rent was an incident of the reversion which, standing alone, would imply that after 1890, rent was no longer an incident to the reversion; but, when taken in connection with the language of the court that follows the words quoted, it is apparent that what the court meant was that under the circumstances as existed in that case, rent was an incident to the reversion."

In that case there had been no grant of the reversion, and the question as to the effect of a grant of the reversion did not arise, as the lessor of the rent claim continued to hold the reversion. The decision of the court was, that, under those circumstances an assignee of the rent claim was entitled to the remedy under the statute.

That was all that the court decided; otherwise, if the rent is no longer an incident to the reversion, it would be necessary in granting the reversion to specifically assign the rent, for if not an incident to the reversion, it would not pass with the land unless specially assigned; and, when a person, who had leased his lands and died, his heirs or devisees, as owners of the reversion, would not be entitled to the rent to accrue. Surely, the court, in what is said in the Coker case did not intend to bring about such results.

So, I contend that it is still the law of this state, as decided in *Watkins v. Duvall*, and *Bowdre Bros. & Co. v. Sloan*, *ubi, supra*, that an unqualified grant of the reversion, by a landlord, carries with it all rent to accrue, except where the rent has been previously assigned to another; and that where the rent has been previously assigned to another; and that where the rent claim is assigned, the assignment must be, not as collateral, but absolutely; that, if assigned as collateral for a loan, the landlord retains a general property right therein and the assignee only a qualified right, and that under those cir-

cumstances, the assignee of the rent claim, not having the entire interest, could not maintain an attachment for the rent, as he would not be an assignee within the meaning of the word, assigns, as used in the statute.

Except as against the rights of an assignee of a qualified interest in the rent note, a grant of the reversion by the landlord, would pass all of his interest in such rent to accrue.

If the assignment of the rent note be as collateral security for a loan, and the landlord should then grant the reversion to another, the landlord's general property right in said note, remaining in him, would pass to the grantee of the reversion; and if the landlord redeems such rent note, it would enure to the benefit of the grantee of the reversion.

Whether or not it be true, as I think it is, that in order to entitle an assignee of the rent note to sue out an attachment in this case was not sued out by an assignee of the rent note, within the meaning of the statute, and that brings me to the second point of this brief. (2) The appellee, having granted the reversion, seeks to maintain the attachment, in this case, as assignee of the rent note.

He cannot be assignee of himself; he cannot be both assignor and assignee of the same note. Having assigned the note as collateral security for a loan, and afterwards redeemed it, he stood exactly where he stood before he assigned it, and having granted the reversion, the rent note when redeemed by him enured to the benefit of the grantee of the reversion; but, whether that be true or not, having granted the reversion, and having redeemed the rent note, he lost any right to sue out an attachment, for the following reasons:

The statute gives the right to sue out an attachment, as heretofore stated, to the lessor, his executors, administrators or assigns, and, having granted the reversion, he could no longer sue out an attachment as lessor, or landlord.

His executors or administrators could not sue out an attachment because he is living, and consequently, he has

no executors or administrators; and his assigns, have not sued out the attachment, in this case, as there are none; so that the appellee in suing out this attachment, did not occupy the position or possess the character, either of lessor, executor, administrator or assigns, and they are the only classes of persons authorized by the statute to sue out an attachment for rent.

An attachment for rent is in the nature of final process, and the law authorizing it must be strictly pursued, and, when the court below so ruled as to permit the appellee to recover in this suit, as his own assigns, the governing statute was stretched far beyond its purpose and meaning; and consequently the court erred in overruling the plaintiff's motion to exclude the evidence, and in refusing to give his Instruction No. 1, directing the jury to return a verdict for him, which motion and instruction constitute the first and second assignment of error, which are applicable to the case as presented in the first paragraph of this brief.

(3) The third, fourth, and fifth assignments of error involve the rulings of the court below, in permitting the appellee to prove, and recover an attorney's fee of ten per cent. of the amount of the rent note, as provided for in the note; and I submit that the court erred in that regard.

The statute authorizes an attachment for rent, or advances made by the landlord or both; and the stipulation in the note for attorney's fees, if placed in the hands of an attorney for collection, did not provide that the attorney's fees should be a part of the rent; and, being no part of the rent or advances, the same should not have been allowed and, by erroneously permitting the same to be recovered, the judgment was increased to an amount several hundred dollars in excess of what it should have been, even if appellee were entitled to recover at all. *Barton v. Kenedy*, 70 Miss. 865; 24 Cyclopedia of Laws, 1235.

For the reasons given, I respectfully submit that this case should be reversed, and dismissed in this court, without remanding same to the court below.

*Bell & White, for appellee.*

Did the conveyance of the leased premises by McLemore to Smith carry with it all rents and bar McLemore from suing out the attachment and distress?

We submit that Smith's knowledge that the rents were hypothecated and did not pass with his conveyance, which the testimony of Mr. Roberts established, destroys the first position of appellants and answers the first question negatively, but, even if it did not and the rents passed to Mr. Smith, they certainly, on his transfer to Messrs Moore and Nichols, became the property of Mr. McLemore, because they were expressly reserved to him in the contract of sale and the sale to Moore and Nichols. We, therefore, see nothing in the learned argument as to rents passing with the land or being severed from it because at the time of the levy, the land was owned by Messrs. Moore and Nichols, who had expressly given up the rent to Mr. McLemore and had received the full value thereof, it being credited on their purchase price. We submit, however, that the first two points have been decided by this court, in *Coker v. Britt*, 78 Miss. 583, when the court used the following language:

"Prior to 1890, rent was an incident of the reversion and the assignee of the rent note could not distrain for its payment but by chapter 51, Acts of 1890, any assignee or holder of a claim for rent was given the remedy of distress before that time, exercisable only by the lessor or the assignee of the reversion, and that remedy is also secured to the assignee of the rent claim by section 2501, Annotated Code."

We submit that the court meant what is said and that in Mississippi rent is no longer an incident of the reversion. But even if it be an incident of the reversion, we further submit that if it passed to Smith under the deed from McLemore, it would necessarily have passed to Moore and Nichols under the deed from Smith and these gentle-

men, by expressly granting it to McLemore, vested it in him.

As to the position that Smith would have retained a general property right in the note, we submit there is nothing in that because the note was transferred to Grafton for its face value, which fact was known to Smith, and acquiesced in by him, was granted to McLemore for face value when he redeemed it from Grafton, after its resignation by Moore and Nichols.

If the rents did not pass with the deed, could McLemore as assignee, attach on said note, of which he was holder? As to the right of McLemore to levy the attachment as assignee and holder for value, we submit that this point also was settled by the court in *Coker v. Britt*, when it stated that "any assignee or holder of a claim for rent was given the remedy of distress." The rule that a construed statute, when adopted is adopted as construed, carries the matter beyond question.

We submit in addition to this, however, that Mr. McLemore was assignee and holder for value of rent note and not the landlord at the time of the levy. He had assigned the note to one Grafton and the note was thereafter re-transferred to him. At the time of the re-transfer the title to the land had passed from him and the then owners and holders of the title, who, under the appellants' contention, would be entitled to the rent, had expressly granted the rent to him and had received credit therefor on their purchase price.

We cannot see in what capacity Mr. McLemore could be viewed except as an assignee and holder for value and refer the court to the following authorities: As defined by Jac. Law Dict., "an assignee of a thing is one who is the owner of it, who has the whole estate of the assignor, and possession of the thing in his own right." *Allen v. Pan-coast*, 20 N. J. Law (Spencer) 68, 74. An assignee is one to whom some right in property is transferred. *Ely v. State Land Office Com'rs*, 13 N. W. 784, 785, 49 Mich. 17.

The word assignee, or assignment has no certain fixed or technical meaning, as the word indorsed has when used in reference to promissory notes or bills of exchange. An assignment may be by deed, by writing, by mere parol and delivery, or by the application of equitable principles to a certain state of facts. *Allen v. Pancoast*, 20 N. J. Law (Spencer) 68, 72.

The term assigns, is as comprehensive as that of purchaser, or one taking by purchase. It means those to whom rights have been transferred by particular title, such as sale, gift, legacy, transfer, or cession. *Watson v. Donnelly* (N. Y.), 28 Barb. 653, 658 (Citing Booth's Case, 5 Co. Rep. 77b.)

Are attorney's fees recoverable? On the question of attorney's fees, the case appears to us equally simple. The provision for attorney's fees was a part of the note. It was not extraneous matter, which could not be collected by distress but is an integral part of the rent contract, and a part of the rent under a certain contingency, specifically provided for, which contingency arose.

We find very few cases exactly in point but refer the court to *Johnson v. Durner*, 7 So. 245, where the court held that attorney's fees in a vendor's lien can be recovered.

This was an Alabama decision and the court, following the idea expressed therein, went further in *Richards v. Nestor*, 8 So. 30, in which it held that a stipulation in a lease that a tenant should be taxed with attorney's fees in case of a violation of the lease entitles the landlord to recover attorney's fees in an action to enforce his lien.

In *Fox v. McKee*, 31 La. Ann. 67, the court held that five per cent. fees could be recovered in a distress on the rent that had accrued. In 24 Cyc., page 1230, we find the following: "If the lease provided for an attorney's fee in case suit is necessary to recover rent, the fee is properly allowed as part of the recovery." We claim that no extraneous claim has been attached to the rent claim, but submit that under these authorities and the rule of reason,

the attorney's fee is an integral part of the rental obligation and properly allowed.

ETHRIDGE, J., delivered the opinion of the court.

In November, 1919, G. B. McLemore, the appellee, sued out an attachment as landlord for rent in arrears and levied on a lot of cotton in Washington county, Miss. J. B. O'Keefe, one of the appellants, replevined the cotton, and at the December, 1919, term of the circuit court filed his declaration in replevin against McLemore for the said cotton, to which declaration McLemore filed an avowry justifying the seizure of the cotton as landlord by virtue of a certain lease beginning the 3d day of March, 1919, and ending the 31st day of December, 1919. In this attachment, upon which this suit is based, it is stated to have been for a term commencing on the 1st day of November, 1919, and ending on the 1st day of January, 1920. To the said avowry the plaintiff O'Keefe filed a replication denying any indebtedness to McLemore and gave notice of the filing of special matter under the general issue; first, that as part of the said lease the defendant agreed to erect on the leased premises, as soon after the date of the said lease as possible, a suitable barn for housing the tenant's stock and for storing his feedstuff, which agreement the defendant had breached, and in consequence thereof the plaintiff had sustained specific damages; second, that some of the cotton specifically designated, levied on, was not grown on the leased premises, and had never been thereon, and was not subject to attachment; third, that after making the said lease McLemore conveyed by deed the leased premises to one C. R. Smith, before any rent became due, without reserving or excepting the said rent therefrom, in consequence of which said rent is alleged to have passed to said C. R. Smith, and said McLemore ceased to be the landlord and was no longer entitled to an attachment for rent. After this notice was filed, the defendant, McLemore, by leave of the court

amended his affidavit, the writ of attachment, the avowry, etc., by inserting after the name J. B. McLemore wherever the same occurred the words "assignee and holder for value at the making of the levy," so as to show the proceedings were prosecuted as assignee of the rent note and not as landlord.

On the trial it appeared that McLemore, by deed dated March 4, 1919, conveyed the premises involved in the suit to one C. R. Smith by deed absolute in form without reservation of the rent, which deed was recorded April 10, 1919. At the time this deed was executed McLemore had placed the note for the rent involved as collateral for a loan with one Grafton, and there was a verbal understanding between Smith and McLemore that the rent note did not pass with the conveyance, and it was also in testimony that this deed from McLemore to Smith was made for the purpose of procuring a loan for the benefit of McLemore. Subsequent to the execution of the deed McLemore paid the debt to Grafton, and the note was redelivered to McLemore without indorsement or writing from Grafton, and subsequent to this McLemore entered into a contract with Moore and Nichols to sell them the premises in question, in which contract the rent was reserved to McLemore, and credit for the amount of the rent was deducted from the purchase price of the premises, and on August 16, 1919, C. R. Smith conveyed the premises to Moore and Nichols; the rent notes sued on containing, among other things, a provision for the payment of an attorney's fee if not paid at maturity. The rent contract and notes were signed by one Stewart and were assumed afterwards by O'Keefe under a contract taking over an assignment of lease and O'Keefe assuming to pay the note.

When the defendant offered his proof and closed his case, the plaintiff, who is the appellant here, moved to strike out the evidence, and also for a peremptory instruction on the theory that the defendant was not the owner of the rent note and was not the landlord, which motion was overruled. Appellant requested instruction

that an attorney's fee could not be allowed in this proceeding, which was refused, and the defendant was given an instruction informing the jury that he was entitled to recover the amount of the note, interest, and attorney's fee, amounting to a given sum, less any amount that the plaintiff might be damaged by failure to erect the dwelling house and barn upon the leased premises, in accordance with the stipulations of the rent contract. The plaintiff objected to the introduction of the evidence as to the understanding between McLemore and Smith as to the rent note, because there was no reservation in the deed. There was a judgment for the defendant, McLemore, for the amount of the note, interest, and attorney's fee, without deduction for damages from the failure to erect the residence and barn referred to in the contract, and a judgment was rendered for this amount, from which judgment this appeal is prosecuted.

We will first deal with the proposition of the attorney's fee allowed the defendant on this note. The statute gives the landlord a lien to secure the payment of the rent and for money advanced to the tenant, and the fair market value of all advances made by him to his tenant for supplies for the tenant and others with whom he may contract and for his business carried on on the leased premises, and for live stock furnished during the year for which they were furnished, and for farming tools, implements and vehicles furnished by him to his tenant. By statute and the decisions of this court this lien is superior to all others, and is good even against a *bona-fide* purchaser for value, without notice. The proceeding here was begun by suing out a distress, which is a statutory method of collecting rent and supplies, and we think the landlord's lien does not embrace money expended for an attorney's fee in enforcing his rights. He has a contract with the tenant which is good as a personal demand against the tenant, but it is not secured by a lien against the agricultural products and ought not to be allowed in a proceeding of this kind. We will not extend the statute so as to cover

demands not embraced in the terms of the statute, and the instruction for the appellant on this feature of the case should have been given, and the instruction given the defendant authorizing the allowance of an attorney's fee in this proceeding ought not to have been given, and constitutes reversible error.

In the next place it is insisted that there is no right to the distress because McLemore was neither the landlord nor the assignee of the landlord; that he cannot be both the assignor and the assignee of the same instrument. The deed from Smith to Moore and Nichols, while referred to in the briefs, is not in the record, nor are its terms set forth in the agreement as to facts. Smith is not a party to this suit, and no right which he may have could be adjudged in this suit. It is recited in the agreed statement of facts that the deed from Smith conveyed the land to Moore and Nichols, and that the deed is recorded in a named book and page of the land records of Washington County, Miss., which deed was read in evidence to the jury by the defendant, the appellee. But it is not stated in the agreement, nor does it appear in the record from any copy of the deed, that the rent notes, or rent, was reserved to McLemore in that deed. We think it was error to receive in evidence in a law court the understanding between McLemore and Smith, and that it was not admissible to show the verbal understanding reserving the rent. The rent note, it is true, at that time was held by Grafton as collateral security for a loan to McLemore, and his title, the assignment for this purpose being known to Smith, would protect him from Smith's claim to the rent should Smith assert any such claim; but when McLemore paid Grafton the debt which was secured by the assigned note Grafton's right to the note ceased to exist, and Smith's right under the deed became effective, and the fact that McLemore had the note in his manual possession would not give him title to the rent nor a right of action for its enforcement. It may be that the stipulation, if there was a stipulation, in the Smith deed to Moore and Nichols

may have had the effect to vest in McLemore the right of the rent note as an assignee, and, if so, of course the right to enforce the note by remedies created by statute would exist. This may be determined on a new trial. We do not enter upon a consideration now of any equitable features or rights that may exist in McLemore. It may be that he has such rights as could only be invoked in the chancery court, and it may be that the case ought to be transferred to the chancery court, but in the absence of Smith being a party to the record we do not feel authorized to remand it to the chancery court instead of the circuit court.

For the errors indicated, the judgment will be reversed and the cause remanded.

*Reversed and remanded.*

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**BUCKEYE COTTON OIL CO. v. SAFFOLD.**

[87 South, 893, No. 21551.]

**MASTER AND SERVANT.** *Cleaning machine in motion, held proximate cause of injury.*

Where a master has provided a perfectly safe contrivance by which machinery might be started or stopped at will, and an employee, who was in sole charge of the operation of the machinery, started it in motion, and then without necessity undertook to clean it while it was in motion, and as a consequence was injured, the act of the employee in selecting a highly dangerous method of performing a duty when a perfectly safe method was equally available was the proximate and sole cause of the injury.

**APPEAL** from circuit court of Leflore county.

**HON. S. F. DAVIS**, Judge.

Action by Boyd Saffold against the Buckeye Cotton Oil Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause dismissed.

*Sam L. Gwin and B. L. Mayes*, for appellant.

We respectfully submit that the plaintiff's testimony even if considered alone, and stretched to its utmost, wholly fails to establish any liability on the part of the defendant for his regrettable injury.

We submit in the first place, that the mere statement of the plaintiff that the dust and lint which fell from the press room into the basement could have been prevented from so doing, unaccompanied by any explanation other than his unexplained remark of "by building a better track," is insufficient to establish negligence. And that it is obvious, even from a consideration of the plaintiff's testimony alone that his injury was simply an unfortunate accident in so far as the defendant is concerned, and that this case is plainly to be classified with the case of *Iler v. Nix*, 114 Miss. 293, 75 So. 12; *R. R. Co. v. Downs*, 109 Miss. 142, 67 So. 962; *Y. & M. V. R. R. Co. v. Perkins*, 108 Miss. 111, 66 So. 273; *Crossett Lumber Co. v. Land*, 84 So. 16.

But conceding, for the purpose of this argument, that the bare statement of the plaintiff just referred to is sufficient to and does tend to show negligence on the part of the defendant, it is perfectly obvious and manifest on the face of the plaintiff's testimony that the negligence of which he complains had no connection in point of fact or in point of law with his injury; that it did not contribute to his injury in whole or in part, but that, on the contrary his own deliberate and voluntary act of starting the press and then cleaning the running machinery (or of cleaning the running machinery without stopping the press) was the sole and approximate cause of his injury.

We submit that, notwithstanding our contributory negligence statute, it is not always the case that a negligent act imposes legal liability, and we make this statement having before us the remarks of this court in the case of *Ragland v. Native Lumber Co.*, 78 So. 542.

It may be conceded (though this court merely says there may be some merit in the argument) that a plaintiff is not debarred of recovery by his negligence unless his negligence is "the sole and approximate cause of the injury." The law, conceding it so to be, is an authority in the defendant's favor; for it is obvious that in this case the plaintiff's negligence was the sole and approximate cause of his injury. There was no causal connection whatever between the defendant's negligence and the plaintiff's injury. The only negligence complained of was the failure of the defendant to prevent the dust and lint from falling from the press room into the basement. But the result of such negligence extended no further than the clogging of the press. There all causal connection ceases. The clogged condition of the press did not bring about or contribute in the slightest degree, in fact or in law, to the plaintiff's injury. His injury was solely the result of the plaintiff's own act in not cleaning out the cotton before he started the press, or of not stopping the press before he attempted to do so, and of his unheard of act of attempting to clean a piece of moving machinery with his hands. Not only is it true that such act of the plaintiff himself was the sole and approximate cause of the injury but this court in a clear and lucid opinion has already adjudicated that such is the case.

The decision of this court to which we refer is *Ovett Land & Lumber Company v. Adams*, 109 Miss. 740, 69 So. 499. In the case of *Ovett Land & Lumber Company v. Adams*, *supra*, the facts were as follows: "The appellant (defendant below) owned and operated a saw mill. Logs were hauled from the camps up an incline to the saw shed by means of a cable attached to the log car. A belt ran over a spool wheel, to which the cable was attached, and while the appellee was hauling a log up the incline he noticed that the leather belt was slipping off of the wheel, and without stopping the machinery he placed his foot against the rapidly moving belt in an effort to push it back into place on the wheel, and a lip or projection in said belt

struck against his foot as the belt revolved, threw him down and injured his leg . . . Appellee contends he was confronted with a sudden emergency, and was attempting to keep the belt from slipping off the wheel, and thereby prevent an accident which would have resulted in an injury to himself and to the machinery. The appellant contends that the defective belt was not the approximate cause of the injury, and that the appellee should have pulled a lever and stopped the machine before attempting to adjust the belting."

In the lower court the appellant here, defendant there, requested a peremptory instruction which the court refused and the case went to the jury and the jury found for the plaintiff. It was established in the lower court and conceded in this court that the belting was defective and the briefs of counsel, as they appear in the record, were devoted wholly to a discussion of whether the plaintiff's act failing to stop the machine was the sole and proximate cause of his injury. The opinion of the court is very brief and we will set it out in full:

"Cook, J., delivered the opinion of the court. As we read the record in this case, the court should have excluded all of the evidence offered by the plaintiff, and directed a verdict for the defendant. The alleged defect in the belt was not the cause of the injury. The lip, on the belt was harmless, so far as the plaintiff was concerned. The master provided a perfectly safe contrivance to operate the machine, and instead of using the safe means provided the plaintiff undertook to stop the machine by pressing his foot on a rapidly moving belt. This act of his was the approximate and sole cause of his injury. Reversed and cause dismissed."

So it appears that in the case of *Ovett Land & Lumber Company v. Adams*, this court has expressly decided that when a machine is equipped with an appliance for stopping and starting it, and the employee attempts to repair a defect in the machine while the machine is running, with-

out utilizing the appliance and stopping the machine, his failure to stop the machine is the proximate and sole cause of his injury."

And this court will find, by examining the briefs of counsel in that case, that the case arose after the passage of our contributory negligence statute and that a large portion of both briefs was devoted to a discussion of whether the fact the belt was defective (in other words that defendant was negligent) would permit plaintiff to recover in view of our contributory negligence statute, notwithstanding the act of the plaintiff in failing to stop the machine.

The case of *Ovett Land & Lumber Co. v. Adams*, so clearly and unquestionably decides this case that it would be vain to indulge in an extended argument to demonstrate that fact. It appears beyond all doubt that the press was equipped with appliances for starting and stopping it, and that the plaintiff could have stopped the press and cleaned out the cotton in perfect safety. In the case of *Ovett Land & Lumber Co. v. Adams*, the court expressly decides that where the machinery is so equipped and the employee attempts to remedy a defective part of the machinery, without stopping the machinery, his failure to stop the machinery, is the "sole and proximate cause of his injury." If any other authority than the case of *Ovett Land & Lumber Co. v. Adams*, is necessary, there are several other decisions of this court to the same effect. Such cases as this do not frequently find their way to this court but there are several cases where conduct of the plaintiff was substantially similar to the conduct of the plaintiff in this case, and in no such case has the court allowed a recovery to stand.

Two cases of this character are the case of *Natchez Cotton Mill v. McLean*, 33 So. 723, and *Newman Lumber Co. v. Dantzler*, 64 So. 931.

In the *McLean* case the plaintiff attempted to collect some grease from a pair of revolving cog wheels and her hand was caught in the wheels, and though a young girl

this court declined to allow a recovery. In the Dantzer case the court holds that there can be no recovery where the servant attempted to pull a ravel strip off of a belt without disconnecting the machinery, and that the refusal of an instruction to such an effect was a reversible error where one of the witnesses testified such was the case.

And this court will note in the case of *Ovett Land & Lumber Company v. Adams*, *supra*, the plaintiff claimed to have been confronted with, and to have acted under, a sudden emergency, still the court did not allow him to recover. In this case the plaintiff makes no such claim, there is no suggestion of it in his pleadings or his testimony.

*F. M. Witty*, for appellee.

There was, as we have attempted to point out, ample evidence to warrant the jury in believing that, while plaintiff was operating defendant's press, the defendant permitted lint, cotton and dust to clog the machinery and to come into the press room in large quantities; that this could, without great inconvenience or expense, have been avoided, but defendant did not do so; that, because of this condition, plaintiff was compelled himself to clean up the cotton and, in so doing, to place his hands into close and dangerous proximity to the running machinery, that this work of cleaning was as much a part of plaintiff's duties as operating the press, made so because the press would not operate efficiently unless it were cleaned and because plaintiff was expressly ordered to do this cleaning; that the only time when plaintiff could do the cleaning was when the machinery was in motion and that such work was plaintiff's regular work for defendant—was extremely dangerous and defendant knew it to be, or could have known by the exercise of reasonable care and diligence; and that the usage and dangerous condition of the place where plaintiff worked brought about the injury.

But appellant says that plaintiff should not have done the cleaning with his hands. The complete answer to that contention is that the jury saw the machinery and the place and, by its verdict, decided that the only way the place could have been cleaned by plaintiff was by using his hands. Certainly the jury was competent to pass upon this question after it had viewed the scene. Again, it will certainly be presumed that plaintiff was adopting the method which to him seemed best in the absence of any instructions from his superiors as to the exact method he should follow. Plaintiff says that it was utterly impossible for him to clean the place while the machinery was still, this being the only method which defendant, according to the record has ever suggested to obviate the danger.

The record does not show any means which was suggested by defendant, whereby the machinery could have been safely cleaned while it was in motion. And in this the case at bar is readily distinguishable from the case of *Ovett Land & Lumber Co. v. Adams*, 69 So. 499, so confidently relied upon by appellant. In that case this court reversed and dismissed the cause because: "The master provided a perfectly safe contrivance to operate the machine and instead of using the safe means provided, plaintiff undertook to stop the machine by pressing his foot on a rapidly moving belt." In the case at bar, the only means of safety which defendant claims could have been adopted by plaintiff was to clean the machinery and around the machinery only when it was not being operated. Plaintiff says that this was impossible; that he could do the cleaning only when the machinery was in motion; and the jury has seen fit to accept plaintiff's statement as true. So where is the safe way out which the master has provided?

Appellant also cites the case of *R. R. Co. v. Perkins*, 66 So. 273, which was a case where a carpenter sued his employer for not furnishing him a safe place to work and for injuries sustained on account thereof. A scaffold had been built by plaintiff himself from which he was work-

ing, when it fell and injured him. This court, of course, held that the accident was the result of plaintiff's failure to construct the scaffold properly and that his employer could not be held accountable for his own default. In the case at bar, the plaintiff had nothing whatever to do with the lint cotton and dust coming in and clogging the machinery; and that being true the non-delegable duty of the master to furnish him a safe place to work existed in full force and effect.

Defendant pleaded that plaintiff assumed the risk; but of course, if defendant was negligent, as the jury decided, this defense does not avail. Hemingway's Code, section 504, 77 So. 857. If he (plaintiff), were guilty of contributory negligence, this, of course, under our statute, will not bar a recovery. Plaintiff, according to all the evidence, was acting under the orders of his superior, who had a right to control his services, and the doctrine of assumption of risk does not apply to his case. *R. R. Co. v. Guin*, 68 So. 78 (on page 80). The very recent decision of this court in the case of *Cecil Lumber Co. v. McLeod*, 85 So. 78, is strikingly similar in principle and in facts to the case at bar.

In the case of *Finkbine Lumber Co. v. Cunningham*, 57 So. 916, it was plaintiff's duty to oil the saws in defendant's mill, and defendant had negligently permitted trash to accumulate near the machinery, and plaintiff in doing his work and in oiling the saws had to come in close proximity, of course, to the saws, and in so doing, stumbled over the trash and was injured on the saws. In that case also the defendant was held liable for its failure to furnish a safe place for plaintiff to work.

In the case of *Sea Food Co. v. Alvis*, 77 So. 857, in the course of his work, plaintiff came near unguarded and dangerous machinery, upon which he was injured, and again the master was held liable. In that case it does not appear that it was absolutely necessary for plaintiff to have come in close proximity to the dangerous machinery, but he did so incidentally in the course of his employ-

ment, and this court permitted his recovery to stand. The case at bar is much stronger than this case just cited, in that the plaintiff here was actually required by the necessity of doing his work properly, and by the orders of his superiors, to place his hands near the unguarded and dangerous machinery, and in so doing his sleeve was caught and he lost his arm.

In the case of *R. R. Co. v. Thomas*, 40 So. 257, plaintiff's intestate, and employee of the railroad company, was required by his duties to go upon the top of the train, and while there the train passed under a bridge which defendant had permitted to be too low, and deceased was knocked off the train and killed. There was evidence in that case that the deceased knew of the location of the bridge, and the defendant pleaded contributory negligence, but this court held that in discharging his duties to his master the deceased was put into a place which was unsafe and dangerous, and was injured thereby, and that the verdict of the jury settled the controversy with regard to contributory negligence.

The duties of the master relative to furnishing the servant a safe place in which to work cannot ordinarily be delegated to fellow servants, and the risk relative thereto is not such as is ordinarily assumed by the servant. . . . This is a correct announcement of the law on this subject, and as a matter of law, therefore, on the facts of this case no assumption of risk, nor contributory negligence, can be charged to the deceased employee. It was the duty of the master to use every reasonable effort to see that the place in which these employees worked was safe, and they had a right to assume that this duty would be strictly complied with. *Murray v. Natchez Drug Co.*, 66 So. on page 332.

The above language was used by our court prior to the passage of our statute (Hem. Code 504) which abolished assumption of risk where the injuries resulted in whole or in part from the negligence of the master.

In the case of *Brooks v. Desoto Oil Co.*, 57 So. 228, the plaintiff was required to work near revolving machinery, upon which was a protruding and exposed screw, and was caught in this screw and injured, as alleged by the declaration. This court said: "That this unguarded set screw constituted a menace to the life and limb of any person engaged in the work being done by appellant at the time of his injury is hardly open to question."

In that case also, contributory negligence of the plaintiff was pleaded by the defendant, but the court held that the master was either negligent as a matter of law, or the question of his negligence was one for the jury. And in passing we desire to call the attention of this court to this language used in that decision: "That this danger could have been easily removed by guarding or sinking the set screw is also equally obvious." This language applies with great force to the facts of the instant case, where there was evidence also that the source of danger could easily have been eliminated by the master.

In the case of *Ennis v. Y. & M. V. R. R. Co.*, 79 So. 73, deceased, was required, during the course of his work, to bring his hand in contact with an electric light globe, which was defectively wired, and he was thereby electrocuted. This court held that the employer was liable, as the live wire was unguarded and dangerous.

There is another case, *R. R. Co. v. Seamans*, 79 Miss. 106, wherein this court went a long ways in holding that the negligence of the master in failing to provide a safe place to work was the proximate cause of the death of its employee. In that case the railroad company permitted a cotton seed house to remain near its track, and from this house cotton seed were allowed to fall and accumulate, and thereby great numbers of cattle were enticed to the spot. The deceased was a member of a train crew on a train which passed the spot at a high rate of speed, and the train struck a cow, and deceased lost his life. The defendant vigorously contended that the unsafe condition of the place was not the proximate cause

of the injury, but this court refused to sustain that contention, and held that the master had permitted the place to remain unsafe and dangerous, and was liable. The defendant also proved that there were numerous such places along railroad tracks all over the country, thereby resorting to the same defense which is relied upon in this case. It was shown too that members of the train crew knew of this condition which prevailed at the spot where the accident occurred, and that the condition was notorious, but no custom in regard to the condition of such places, and no contributory negligence of the deceased was recognized by this court, and the judgment for damages was upheld.

We will not go further with the citation or discussion of authorities in support of this case, but respectfully submit that those we have mentioned are decisive.

W. H. Cook delivered the opinion of the court.

This suit was instituted by the appellee, Boyd Saffold, against the appellant, the Buckeye Cotton Oil Company, to recover damages for personal injuries alleged to have been sustained by appellee while he was operating a cotton press at appellant's mill, and from a judgment for plaintiff for the sum of one thousand dollars this appeal was prosecuted.

The declaration alleges in substance that appellant owned and was engaged in operating a certain cotton press; that plaintiff was employed by appellant to operate this press; that it was the duty of appellant to exercise reasonable care to furnish appellee a reasonably safe place to work and reasonably safe appliances with which to work; that appellant negligently failed in its duty in this regard, in that it permitted the machinery of the press to become and remain covered and clogged with lint cotton and other debris, so as to hinder the operation of the press and to make it necessary for plaintiff, in order to operate the press, to remove the lint cotton and other

debris from the machinery; that it was extremely dangerous to remove this lint cotton and debris, for the reason that, in doing so, it was necessary for appellee to put his hands into close proximity to the machinery, and between the parts thereof, while the machinery was in motion; that the appellant knew, or by the exercise of reasonable care and prudence could have known, that the machinery became covered and clogged with this cotton and other debris, and that in order for appellee to perform his duty to his employer it was necessary for him to remove this cotton with his hands while the machinery was in motion, and, in so doing, to place his hands in close proximity to the machinery and between the parts thereof; that while said machinery was in motion appellee, in the discharge of his duties, undertook to remove the cotton and debris from the machinery with his hands, and in so doing his left hand became entangled in the machinery and was crushed and torn from his body. Upon motion of appellant, appellee also filed a bill of particulars, alleging that, in attempting to clean the press with his hands while it was in motion, he acted under the instructions of his superiors, the officers of appellant company.

It appears from the evidence that the press, in the machinery of which appellee lost his arm, was a Moulger durable box revolving screw press. This press in its entirety is situated in two rooms, one above the other. The two press boxes are located in the upper room, and a large circular portion of the floor of this press room is attached to the press boxes, and revolves when the press box revolves. Between this circular section of the flooring and the stationary part of the floor there was a small crack or opening, about an inch wide, and it was through this opening that appellee claimed the lint cotton and debris fell into the basement and onto the machinery. In the basement, and directly under the press box, is located the machinery by means of which the cotton in the press boxes was compressed.

This machinery consisted in part of a "crown gear" or "master gear," about three feet in diameter, which was located directly under the bottom of the press box. A small gear, called the "pinion gear," meshed with the crown or master gear, and this pinion gear was attached to a steel shaft about five feet long. To the other end of this shaft was attached a large wheel, called the flywheel, and in side of this flywheel was a friction gear, which was attached to a piece of steel shafting which contained the belt pulley. This friction gear was connected with and controlled by a lever, running from the basement into the press room above, by which the friction gear could be brought into contact with the flywheel, and thus put the machinery of the press in motion. Appellee testified that on the occasion that he was injured he came from the press room above into the basement; that the machinery of the press was not then running; that he started the machinery in motion, and while it was running undertook to clean the gears with his hands, and, when pressed on cross-examination for some explanation as to why he did not clean the machinery before he started it in motion, he replied, "I didn't have time."

There is no contention in this case that there was any defect in the machinery itself, and the only negligence complained of is that the small opening in the floor above the basement was not covered, and as a consequence loose cotton and debris were permitted to fall into the basement and on the machinery, thereby making it necessary for appellee to clean the machinery in order to successfully operate it. The testimony for appellee wholly fails to sustain the allegation that he was instructed to clean the machinery while it was in motion. The only testimony offered by appellee upon this point was to the effect that he was instructed to keep the cotton cleaned up in the basement, while the undisputed testimony of appellee's superiors was that all employees were instructed not to attempt to clean the machinery while it was in motion.

We have reached the conclusion that there was no causal connection between the alleged negligence of appellant and the injury to appellee. The only negligence complained of was the failure of appellant to prevent the dust and lint from falling from the press room into the basement, and conceding, as must be done in the consideration of this question, that it was the duty of appellee to clean the basement and machinery, this duty could have been performed in perfect safety while the machinery was idle. Appellee was in sole charge of the operation of the machinery of the press, and he was furnished with a perfectly safe contrivance for starting and stopping it. There was a lever within easy reach, which was provided for the purpose of starting or stopping the machinery, and appellee was in sole charge of the operation of this lever. He was not confronted with a sudden emergency at the time he was injured, but when he came into the basement the machinery was not in motion, and it could have been cleaned with perfect safety. After appellee had started the machinery in motion, by a simple movement of this lever which was in easy reach, he could have stopped it at any time it appeared to be necessary to clean any part thereof, but instead of selecting the safe method of performing his duties, he chose a highly dangerous method, and as a consequence suffered the injury. We think this act of appellee was the sole and proximate cause of the unfortunate injury.

*Reversed, and cause dismissed.*

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MCGRAW v. BOARD OF SUP'RS OF WINSTON COUNTY.

[87 South. 897, No. 21378.]

1. HIGHWAYS. *Balance due contractor not subject to lien under statute by filing claim with board of supervisors.*

The public roads and property of a county are not subject to the lien created under section 3074, Code of 1906 (Hemingway's

Code, section 2434), in favor of laborers and subcontractors, and by filing with the board of supervisors a notice, claiming a lien on the balance in the hands of the county authorities to the credit of the principal contractor of such roads, a subcontractor can acquire no lien on such balance.

2. HIGHWAYS. *Mandamus. Adjudicated balance due road contractor assignable; assignee of road contractor may compel issuance of warrant for balance on contract.*

When a contractor has construed public roads in a county or subdivision thereof, and such roads have been completed and accepted, and the balance due such contractor for the construction of the roads has been finally adjudicated by the board of supervisors, and there only remains the duty of ordering the issuance of a warrant for this balance, the contractor may assign this balance due to him, and the assignee thereof may maintain mandamus to compel the board of supervisors to issue to him a warrant for the balance so assigned.

APPEAL from circuit court of Winston county.

HON. T. L. LAMB, Judge.

Application for writ of Mandamus by J. D. McGraw against the board of supervisors of Winston county to compel the issuance of a warrant for a payment of money. From a judgment of dismissal petitioner appeals., Reversed and remanded.

*Jones & Jones*, for appellant.

The issuance of a warrant or order upon a claim properly audited and allowed by the board of supervisors is usually regarded as a ministerial duty, which may be enforced by mandamus. 26 Cyc., 315; *Kelly v. Wimberly*, 61 Miss. 548.

The circuit court has unquestioned authority to require subordinate judicial officers to perform any plain duty imposed by law. The writ of mandamus may issue to require a subordinate court to carry into effect its own order, 18 R. C. L., paragraph 245. Mandamus will not lie to require a court to determine a discretionary matter in a particular way unless there has been an arbitrary exercise of discretion. *Clarke v. West*, 198 S. W. 1111.

Mandamus does not lie to control judicial discretion, except when this discretion has been abused; but it may be used as a remedy where the case is outside that discretion and outside the jurisdiction of the court, etc. *Virginia v. Rivers*, 100 U. S. 313, 24 L. Ed. 667.

When the board of supervisors passed an order on the first Monday of July, 1917, it had reached the limit of its discretionary power, and having there audited and allowed F. D. Harvey & Company in payment of the matter adjudicated, and this they did in fact until it came to McGraw's assignment or order, whereupon it arbitrarily refused to issue to McGraw its warrant for moneys held in the treasury of the county for this purpose, because it appeared to it that F. D. Harvey & Company owed other debts the members of the board preferred to see paid.

The case of *Hendrix v. Johnson*, 45 Miss. 644, cited by appellee was one wherein the board of supervisors audited and allowed an account ordered a warrant issued upon the treasury, and the treasurer refused to honor the warrant, the circuit court ordered the writ of mandamus to issue, and the treasurer appealed the case to the supreme court upon a bare record of the pleadings, and the supreme court very properly held in the language quoted by appellee. It is in no way analogous to the case here, as this case comes before this court, with a full record, disclosing every matter having a bearing upon the case, and a reading of the record will disclose in detail the exact *status* of this case.

In the case of *Portwood v. Montgomery County*, 52 Miss. 523, the board of supervisors exercised its discretionary power in refusing a claim when presented, and the relator had his day for an appeal from such refusal. It differs from the instant case in that the board of supervisors considered the claim of F. D. Harvey & Company, audited same and allowed it, and McGraw stands in the same position exactly as F. D. Harvey & Company did with a judgment, which the board of supervisors have already exercised a discretionary power and allowed, but,

now having allowed it refuse to pay it. The order of the board of supervisors is a judgment of a competent court, with jurisdiction. All McGraw could have obtained would have been another judgment, and upon presenting an appeal to the circuit court, upon a review of the record, the appeal would, and should, have been dismissed, as there was already a judgment in the case.

In the case of *McHenry v. State*, 91 Miss. 562, 44 So. 831, mandamus is declared to be an extraordinary writ, and this is true, and when the party aggrieved has his remedy by appeal, or by a suit at law, he cannot resort to this remedy, but this course is the only course the relator in this cause has a right to or may exercise. If he had appealed, as above stated from the order of the board, and the court seeing the order allowing F. D. Harvey & Company the money claimed, would have dismissed the appeal as *res adjudicata*.

I do not seem able to identify the case cited by counsel for appellee in 63 So. 608, but under section 717, Code of 1906, also section 496, Hemingway's Code, declares the assignee of any chose in action may sue and recover on the same in his own name if the assignment be in writing, and the assignment from F. D. Harvey & Company being in writing, warrants McGraw bringing this action in his own name.

The appellee can claim no analogy between the case of *Foote v. Board of Supervisors*, 67 Miss. 156, and the case of *McGraw v. The Board of Supervisors*. In this case Foote held an equitable assignment of a portion of a fund in the hands of or subject to the disposal of the board of supervisors, owing by the board to one Gilmore. Gilmore died and his administrator claimed the entire fund, and several other creditors of Gilmore presented orders thereon. The court very tersely declared that Foote did not sustain such a relation to the board as would entitle him to a writ of mandamus.

In view of the facts of this case, and the law applicable thereto, it is our contention that an order should be made

requiring McGraw to return the money to the treasurer of Winston county, and the writ of mandamus granted ordering the board to issue a warrant to J. D. McGraw, in accordance with his written assignment from F. D. Harvey & Company.

*Z. A. Brantley and Edward M. Livingston*, for appellees.

We submit that the circuit court was eminently correct in the first and second grounds for refusing to grant the writ, because the uncontroverted testimony shows that the money in question in this litigation was in the hands of J. D. McGraw at the time of trial of this case, and there was no money in the treasury of the county out of which this claim could have been paid.

That the appellant, J. D. McGraw executed a bond in the sum of \$—— which was accepted by the board of supervisors and a warrant for the amount issued in favor of McGraw under the provisions set forth in said bond; that the said McGraw should return the amount of said warrant to the board of supervisors in case it was determined that the said McGraw was not entitled to the same in preference to the said sub-contractors.

We think the clause in the contract which is as follows: "The contractor shall indemnify and save harmless the road commissioners, the county and municipality through which the road shall run from all suits or actions," is sufficient to warrant the third ground of the court's refusal to grant the writ. In addition to the above, the specifications provide that the contractor shall discharge all liens, if any, before final settlement is made with the contractor by the commissioners and board of supervisors.

We submit that upon a construction of the contract and bond of the contractor as a whole the third ground of the court's refusal to grant the writ is correct.

In support of the fourth ground assigned by the lower court in refusing the writ we submit that under the terms

of the contract with the highway commissioners and the contractors, F. D. Harvey & Company, that the work of constructing the highway in certain townships as provided by the terms of said contract is not a public work of the county but a special improvement and being a special improvement the sub-contractors therefore have a lien for their work after notice thereof, and the appellant, J. D. McGraw, accepted the assignment from Harvey & Company with notice of the outstanding claims of the sub-contractors who constructed the roads which are now being used by the county.

The appellant, McGraw, should have appealed direct from the order of the board of supervisors rejecting his claim, and failing to follow up his remedy at law, a mandamus will not be awarded. Mandamus is an extraordinary writ and will not be granted except in extreme cases where there is no adequate remedy at law, but in this case the appellant had ample remedy at law and should have availed himself of the same.

"The right to mandamus rests in the legal discretion of the court, and in the absence of facts to enlighten this court on all the points upon which the lower court acted upon, its discretion will not be reviewed, and where it has acted upon a full knowledge of all the circumstances, this court, upon all the points upon which the lower court acted, will presume the lower court acted correctly. *Hendricks v. Johnson*, 45 Miss. 644.

One having a claim against the county which is rejected by the board of supervisors must either appeal from the order or sue the county and obtain a judgment upon his claim before he can maintain mandamus to compel payment. *Portwood v. Montgomery County*, 52 Miss. 523.

"Mandamus is an extraordinary writ and is not to be resorted to when the purpose sought to be accomplished by it can otherwise reasonably be accomplished. *McHenry v. State*, 91 Miss. 562, 44 So. 831. After the refusal by the board to issue the warrant there was only one course left open, viz., a suit at law, 41 Miss. 236.

In conclusion we submit that in case the court should hold that mandamus is the proper remedy in this suit then we submit that the appellant, McGraw, is not the proper party to maintain the suit, but F. D. Harvey & Company, the original contractors with the highway commissioners, there being no contract existing between the highway commissioners and appellant, McGraw, and McGraw not being a party to the contract, the suit should have been brought in the name of F. D. Harvey & Company for the use and benefit of J. D. McGraw. 63 So. 608.

We further submit that the case of *H. W. Foote v. The Board of Supervisors of Noxubee County*, reported in 67 Miss. 156, supports the contention of the appellee in this case.

In view of the facts in this case we think the opinion of the lower court should be affirmed, and J. D. McGraw ordered to refund or repay the money in question to the treasury of the county, and the board of supervisors directed to pay the money over to the various sub-contractors as their respective interests appear.

W. H. Cook, J., delivered the opinion of the court.

Appellant, J. D. McGraw, filed a petition in the circuit court of Winston county, praying for the issuance of a writ of mandamus requiring the board of supervisors to issue to him a warrant for the sum of one thousand three hundred sixty-one dollars and twenty-five cents, and from a judgment dismissing the petition, this appeal was prosecuted.

The facts as developed on the trial of this petition were substantially as follows: In the year 1916, under the provisions of chapter 176, of the Laws of 1914, a road district was formed of a portion of Winston county. Commissioners were appointed, and a contract entered into between the commissioners and F. D. Harvey & Co., a copartnership composed of F. D. Harvey and H. E. Harvey, for the construction of certain roads in the district. The con-

tractors executed a bond conditioned for the faithful performance of the contract and proceeded with the work of constructing the selected roads. During the progress of the work, various links of the road were sublet, and prior to the July, 1917, meeting of the board of supervisors, the work was completed in accordance with the terms of the contract and to the entire satisfaction of the commissioners. At the July meeting of the board of supervisors the commissioners submitted to the board a report to the effect that the roads of the district had been completed according to the terms of the contract and had been accepted by them as finally completed, and that they were indebted to F. D. Harvey & Co. in the sum of eleven thousand one hundred twenty dollars and ninety-two cents, and requesting the board of supervisors to accept the roads finally and treat the report as a final settlement. Thereupon the board of supervisors adopted the following order:

“Came on to be considered the final acceptance of the good roads in the above-named district with F. D. Harvey as contractor, and on recommendation of the commissioners, to wit, W. C. Hight, A. S. Harris, and I. A. Sanders, commissioners, for the said district, that the said contractor F. D. Harvey had fully complied with said contract and that said road had been completed in all respects according to the plans and specifications adopted by the said commissioners, and that he, the said F. D. Harvey, was entitled to a final settlement on said roads, and the board, after being fully advised in the premises and being satisfied that the said commissioners and the said contractor had fully complied with the law in the construction of the said roads, and that the plans and specifications adopted in the construction of said roads had been carried out according to contract, it is therefore ordered by the board that the report of the said commissioners be, and the same is hereby, adopted and ratified, that said roads be fully accepted as being completed, and that the said F. D. Harvey and his bondsmen on his said contract be, and they are hereby, discharged and released from any further lia-

bility on his said contract as said contractor and in the construction of the said roads, and they and each of them are hereby discharged from any and all further liability in connection with the construction of said roads."

It further appears from an entry on the minutes of the board of supervisors that the contractor, F. D. Harvey & Co. authorized the board to pay a certain portion of the balance due them to certain subcontractors, but there was a disagreement as to the amount due these various subcontractors, and the board withheld the sum of one thousand three hundred sixty-one dollars and twenty-five cents of the balance due the contractor, and entered on its minutes the following order:

"Came on to be considered the matter of final settlement between F. D. Harvey and the subcontractors in the above named districts in said county and state; and it appearing to the board that the said F. D. Harvey had prepared and filed a certain statement with the clerk of said board admitting certain amounts of indebtedness to certain subcontractors therein named, and authorizing that said amounts therein named as being due the parties therein named be paid by the clerk on order of said board, and it further appearing to the board that there is a difference between the said F. D. Harvey and the subcontractors as to the whole amount due the said subcontractors by the said F. D. Harvey on the various amounts of work done on the said road, that is to say, the said F. D. Harvey is charging the said subcontractors for work of an extra engineer on said roads or in the construction of the said roads; and it appearing that the said subcontractors are denying liability for said extra work, and have filed with said board a legal notice claiming a lien on said work for the full amount due on said roads exclusive of any extra engineering service: It is therefore ordered by the board that the clerk of said board be, and he is hereby, authorized to issue to the said subcontractors named in the estimate furnished by the said F. D. Harvey to the said board warrants to be paid out of the good roads fund

now on hand in said good roads district; and, the same being funds derived from the sale of bonds in said good roads district in the amounts shown to be due said contractors by said F. D. Harvey, it is further ordered by the board that the amounts claimed by the said F. D. Harvey against the said subcontractors for the work of extra engineering, the same being now on file with said board and claimed by the various said subcontractors, and for which they claim a lien on the construction of said roads, be, and the same is hereby, held in abeyance, and the clerk of this board is hereby authorized and instructed to make an itemized account of said claims, and hold the same against the good roads funds in said district until said matter is finally settled and determined between the said F. D. Harvey and the said subcontractors, and in the event they fail to settle said controversy the same to await a judicial determination."

At the July meeting of the board of supervisors the various subcontractors who were claiming a balance against Harvey & Co. also filed with the board a written notice of their claim for this balance, and claiming a laborer's lien on the public roads for said sum, and demanding that this balance be deducted from any sum due Harvey & Co.

It further appears that during the progress of the work of constructing the roads the contractor, Harvey & Co., had become indebted to appellant, J. D. McGraw, for supplies furnished, and for which the said Harvey & Co. had executed a promissory note. In August, 1917, this note was placed in the hands of an attorney for collection, and in settlement thereof Harvey & Co. executed to appellant a written assignment of the balance of one thousand three hundred sixty-one dollars and twenty-five cents due them by the board. At the September meeting of the board of supervisors, appellant presented this assignment to the board, and demanded the issuance of a warrant for this balance. This demand was refused, and the board entered an order in the language following:

"Came on to be considered the petition of J. D. McGraw, showing an assignment of F. D. Harvey & Co. of certain money, to wit, the sum of one thousand three hundred and sixty-one dollars and twenty-five cents, claimed to be a balance due the said F. D. Harvey & Co. for road work in district No. 1, township 14, range 12, and 15—12; said petition reciting that the said board of supervisors now held and retained in their hands or in the county treasury the said sum of money, the same belonging to F. D. Harvey & Co., and asking the board to issue a warrant on the said treasury for said amount in favor of J. D. McGraw.

"The board, after considering the same, is of the opinion that the said sum assigned belongs to certain road contractors in said road district, and is not the property of the said F. D. Harvey & Co., and under the law and under his contract with the road commissioners in said district he had no authority to assign said money; that according to statement filed with said board on the first Monday in July, 1917, by the said F. D. Harvey & Co. they have failed to pay the amounts due all contractors on said road work, and that his said contract with the road commissioners of said road districts provides that before they shall be paid in full all claims for work done on said roads must be discharged and met and paid.

"It further appearing to the board that they had been served by certain subcontractors with notice of certain amounts due them for road work, the same being admitted by the statements filed by the said F. D. Harvey & Co. with the said board, it is therefore ordered by the board that the petition and assignment in favor of J. D. McGraw be, and the same is hereby, disallowed, and the claim denied."

On the 5th day of November, 1917, the various subcontractors who were claiming a balance due them for labor performed on the public roads of the county filed in the justice court an ordinary action on open account against F. D. Harvey & Co., and procured the issuance of writs of garnishment against the board of supervisors. The

summons for the defendants, F. D. Harvey and H. E. Harvey, was attempted to be served by publication in a newspaper and by sending the process to the sheriff of Attalla county, where it was served personally on H. E. Harvey. The board of supervisors answered these alleged writs of garnishment, and on December 17th the justice of the peace entered judgments in favor of the board of supervisors and against Harvey & Co. The petition for mandamus requiring the board to issue the warrant to appellant was filed on the 5th day of December, 1917.

The holding of the lower court, and the contention of counsel for appellee, that the work of constructing public roads in a district or subdivision of a county was not a public work of the county, but a special improvement, and for that reason, by filing a notice with the board of supervisors, the subcontractors acquired a laborer's lien on the public roads of the district, cannot be maintained. It is perfectly clear that the public roads which were constructed in the subdivision of the county were public roads of the county. The public roads and property of a county are not subject to the lien created under section 3074, Code of 1906 (Hemingway's Code, section 2434), in favor of laborers and subcontractors, and by filing a notice with the board of supervisors claiming a lien the subcontractors acquired no lien on the funds in the hands of the county authorities. *Board of Supervisors v. Gillen*, 59 Miss. 198.

At the date of the execution of the assignment to appellant the road work had been completed and the roads accepted; the contractor, Harvey & Co., had been finally discharged by order of the board of supervisors; the balance due the contractor had been finally adjudicated by the board, and there only remained the ministerial duty of ordering the issuance of a warrant for this balance. The balance due the contractor had not been impressed with any sort of lien, and Harvey & Co. was free to assign this balance to appellant in payment of any indebtedness which the company then owed to him. The assignment executed

to appellant was valid, and upon filing this assignment with the board of supervisors he was entitled to have a warrant issued to him for the balance which had previously been adjudicated as due the contractor, and upon the refusal of the board to allow his claim and order the issuance of the warrant therefor, appellant, as assignee of Harvey & Co., was entitled to maintain a petition for a writ of mandamus compelling the issuance of the warrant.

Since the proceedings which were begun by the subcontractors in the justice court were filed long after the balance due the contractor had been assigned to appellant, no right which might have been secured by such proceedings, if valid, would avail to defeat the prior rights of the assignee, appellant here. For this reason it will be unnecessary to discuss in detail the many defects in the proceedings in the justice court which rendered the judgments there entered invalid.

It appears from the evidence, as well as from the briefs of counsel, that at some stage of the proceedings in the court below some kind of an order was entered by the court, directing that the balance claimed by appellant should be paid over to him upon the execution of a bond to repay it when ordered by the court to do so, and that in pursuance of this order appellant executed the required bond and received the money. This order and bond do not appear in the record, and we are unable to determine the exact nature of the order or the authority of the court to make such an order. The money in question having already been paid to appellant by the board of supervisors, it may be that, since we hold that appellant was entitled to receive this balance, and that, at the time he filed his petition herein, he was entitled to maintain the proceedings for a writ of mandamus to require the issuance of the warrant therefor, it would now be useless to issue the writ requiring that to be done which has already been done. We are unable to determine the exact *status* of this matter, for the reason that the order and

bond under which the payment was made are not before us, but, in any event, we conclude from such evidence as is in the record that the court has full power to require that the money be repaid into the county treasury to await such orders as may be entered by the court in reference thereto. This cause is therefore reversed and remanded for further proceedings not inconsistent with the views herein expressed.

*Reversed and remanded.*

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CROSBY v. STATE.

[88 South. 3, No. 21935.]

**RAIL.** *If convicted person is ready to give bail on appeal, it is error to commit him to jail; violation of statute for protection of female children against insult bailable.*

Under the provisions of chapter 217, Laws of 1916 (Hemingway's Code, sections 44, 45), any person convicted of a felony other than treason, murder, rape, arson, burglary, and robbery are entitled to bail pending appeal; and it is the duty of the trial court, on application therefor, to immediately fix the amount of bail required; and, if the person convicted is then and there ready to give adequate bail, it is error to order such person committed to jail.

APPEAL from circuit court of Perry county.

HON. R. S. HALL, Judge.

G. L. Crosby was convicted of violating the statute protecting female children against insult. From refusal of application for bail after conviction pending appeal, defendant appeals. Bail allowed.

A. T. L. Watkins and C. A. McSwain, for petitioner.

ETHERIDGE, J., delivered the opinion of the court.

The appellant was indicted and convicted under chapter 215, Laws of 1920, entitled "An act for the better protection of female children of tender years against the insults of lustful male persons and prescribing penalties for violations of this act." The act prescribes punishment by fine of not less than ten dollars nor more than one thousand dollars, or to be imprisoned in the state penitentiary not less than one year nor more than ten years, or by both such fine and imprisonment at the discretion of the court.

When appellant was sentenced in the circuit court to the penitentiary for a term of three years he requested the court to fix the amount of bond required for bail pending appeal, stating that he was ready and able to give such bond as would be required, whereupon the court ordered him to be carried to the county jail, and declined then and there to fix the amount of bail pending appeal.

By the provisions of chapter 217, Laws of 1916 (Hemingway's Code, section 44, 45), any person convicted of a felony other than treason, murder, rape, arson, burglary, and robbery is entitled to be allowed bail pending appeal; all felonies other than those named being bailable after conviction under this act.

Since the enactment of this law a person convicted of a felony giving notice of appeal is entitled to be allowed bail pending the appeal, and it is the duty of the court, on application therefor, to immediately fix the amount of bail to be required. The prisoner in such case should be allowed to stand upon his appearance bond, or to have a new bond fixed immediately upon conviction, and the court should, in all cases when requested so to do, immediately fix the amount of bail in such case pending appeal proceedings.

This court decided in *Ex parte Atkinson*, 101 Miss. 745, 58 So. 215, that it has supervisory jurisdiction over the trial court under section 67, Code of 1906, and in the exercise of such supervisory jurisdiction could allow bail

125 Miss.]

Syllabus.

in such cases. This decision was rendered before the passage of the law of 1916, above cited, making felonies generally bailable after conviction, with the exception of cases named in the statute.

We think it was error for the circuit court to refuse to fix the bail immediately upon giving notice of the appeal, and that it had no right to remand the prisoner to jail if he was then and there ready to make a sufficient bond under chapter 217, Laws of 1916 (Hemingway's Code, section 44, 45). The appellant will therefore be allowed bail in the sum of five thousand dollars, conditioned according to law, to be approved by the sheriff of the county.

*So ordered.*

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MERIWETHER v. STATE.

[87 South. 411, No. 21431.]

INTOXICATING LIQUORS. *Eighteenth Amendment and Volstead Act do not supersede or abrogate existing state prohibition law.*

Since the prohibition laws of the state of Mississippi do not in any respect contravene the essential and dominant purpose of the Eighteenth Amendment to the Constitution of the United States, and since the power exercised by the state under chapter 189, Laws of 1918, is in support of the main object of such amendment, the National Prohibition Act, commonly known as the Volstead Act, passed in pursuance of the Eighteenth Amendment to the Constitution of the United States, does not supersede or suspend the said chapter 189, Laws 1918, and the jurisdiction of the state courts to enforce the provisions of said chapter is not affected by the fact that Congress has legislated upon the subject of prohibition.

APPEAL from circuit court of Leflore county.

HON. S. F. DAVIS, Judge.

J. B. Meriwether was convicted before a justice of the peace of unlawfully having in his possession intoxicating liquor. On appeal to the circuit court, a demurrer was overruled, and defendant was again convicted, and he appeals. Affirmed.

*Littleton Upsher*, for appellant.

Meriwether's offense is alleged to have accrued after February 1st, and it is therefore contended that the state law is not applicable to his offense because by prohibiting the use of liquors or its possession in entirety it was in effect repealed when the Federal law went into effect.

It is further contended by reason of the fact that the Congress of the United States acting in pursuance of a power granted to it under the Constitution has legislated in regard to the possession of intoxicating liquors, the subject is entirely removed from state jurisdiction.

In support of these contentions we will call the court's attention to two classes of cases which we consider analogous to one at bar. That is, those arising under the Uniform Bankruptcy Act, and the regulation of interstate commerce. To which might be added cases under the Uniform Law of Naturalization and the Federal Employer's Liability Acts.

Article VI of the constitution of the United States provides: "This constitution and the laws of the United States which shall be passed in pursuance thereof; and all treaties, etc., shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Thus, to reduce our contention to its simplest, we say that the National Prohibition Act passed in pursuance of the Eighteenth Amendment is the supreme law of the land, and since it in terms allows the possession of liquor under certain circumstances, the laws of Mississippi denying the right to such possession are of no effect.

True the Eighteenth Amendment provides that the states shall have concurrent jurisdiction to enforce the terms of this amendment. But the states have always had concurrent jurisdiction to enforce the terms of the constitution, and this amendment thus introduces no new principle of constitutional interpretation.

Black on Constitutional Law, pages 157 and 158, says: "In all such cases of concurrent authority, the enactments of the individual states can be no more than provisional; that is to say, their continuance in force depends upon the determination of Congress not to exercise its own power over the subject by a general law. If Congress shall choose to enter upon the domain confided to its jurisdiction, and to regulate the same by a statute, the result is that all existing state laws on the same subject are superseded and suspended, at least so far as they are inconsistent with the act of congress. The federal law does not make them invalid if they were not before. Neither does it repeal them. It merely assumes to itself entire control over the whole subject and leaves nothing for the state laws to operate upon." Citing in support of this statement, *Sturgis v. Stoddard*, 45 N. Y. 446; *McCulloch v. Maryland*, 4 Wheat. 429; 1 Story, Const. 447.

Thus the law is stated in 6 R. C. L. 139-40. By reason of the provision of the United States constitution that the constitution and laws passed in pursuance thereto shall be the supreme law of the land, when Congress passes a law in that field of legislation common to both federal and state governments, the act of Congress supersedes all inconsistent state legislation. Congress in regulating a matter within the concurrent field of legislation speaks for all the people and all the states, and it is immaterial that the public policy embodied in the congressional legislation overrules the policies theretofore adopted by any of the states with respect to the subject-matter of such legislation. Citing in support thereof: *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Henderson v. New York*, 92 U. S. 259, 23 L. Ed. 543; *Lake Shore & M. S. Ry. v. Ohio*, 43 L. Ed. 858; *Savage v. Jones*, 56 L. Ed. 1182; *Mondou v. N. Y. N. H. Ry. Co.*, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, and numerous other cases.

Thus the supreme court of Wisconsin speaking through DODGE, J., says: "Within the field of authorized legislation the federal power must, in the nature of things, be

supreme in all parts of the United States. . . . In *Cooley v. Port Wardens*, 12 How. 299, 318, 13 L. Ed. 996, 1004, it was said of this class of legislation: 'It is not the mere existence of such a power but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations.' In *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421, 15 L. Ed. 435, where a state law authorized the building of a bridge over a navigable water, it was declared that, even in a matter of a bridge, if Congress chooses to act, its action necessarily precludes the action of the state. . . . See, also, *Gibbons v. Ogden*. It will be observed from these utterances that it is not a mere question of conflicting laws of jurisdictions, so that the law of a state will be valid so far as not antagonistic to a federal law. The question is more properly one of jurisdiction over the subject; the holding being that within the second class of subjects above outlined, silence of Congress is deemed a resignation to the states of such jurisdiction and authority, but action by Congress upon the particular subject is deemed an assertion of the federal power a declaration of the policy that the subject shall be under federal and not state regulation.'" *Wisconsin v. C. M. & St. P. Ry. Co.*, 117 N. W. 686, 19 L. R. A. (N. S.) 326. See, also, *State v. Texas N. O. R. Co.*, 124 S. W. 984, and *State v. Missouri P. R. Co.*, 212 Mo. 658, 111 S. W. 500, and *Mondou v. N. Y. H. & N. Ry. Co.*, cited above; *Northern Pacific v. Washington ex. rel.*, *Atkinson*, 56 L. Ed. 237.

Thus in the celebrated cases of New Jersey and Kentucky recently decided by the United States supreme court, where the states attempted to enjoin the enforcement of the National Prohibition Act, because those states had passed laws making the standard of alcohol higher than the federal act, that the federal agents could enforce the provisions of the federal act, notwithstanding a more liberal policy had been adopted on the part of the states. No reasons were assigned by the court for this holding, it is

true, but it is inconceivable that any reasoning other than that of the federal act being paramount to the state law on the same subject could possibly have influenced the court in its decision. New Jersey, Rhode Island, and Kentucky sought to be more liberal than the United States while Mississippi seeks to be more stringent. The difference is one of degree, but not of principle.

That an act punishable under the laws of the United States within the scope of its criminal authority vests entire jurisdiction in the federal courts has been decided by this court in *State v. Bardwell*, 72 Miss. 535. See, also, cases therein cited.

Other cases from the courts of the several states and the United States could be cited in support of this contention, but we will rest with the case cited above. There is an apparent and evident conflict between the provisions of the state law and the federal law on the point at issue; one or the other must yield; it is an anachronism that one jurisdiction should say "thou mayst," the other, "thou shalt not." No man can serve two masters, nor obey conflicting laws of two powers occupying the same territorial jurisdiction. One law must, in the very nature of things be supreme, and the weaker power must yield. That power is the state law, and we submit that with the yielding of the state law, the demurrer should have been sustained and the appellant discharged. There is no dispute on the facts.

*Fred H. Lotterhos*, for appellee.

By chapter 189, Laws of 1918, it is made unlawful to have control or possession of intoxicating liquors in Mississippi. The legislature had the power to make this enactment under the police power of the state. See *Purity Extract & Tonic Co. v. Lynch*, 100 Miss. 650, and 59 L. Ed. 184; *City of Jackson v. Gordon*, 119 Miss. 325; *Crane v. Campbell*, 62 L. Ed. 304.

It is claimed here that the action of Congress in passing the National Prohibition Act, by virtue of the Eighteenth Amendment, has removed from the state's jurisdiction the

prohibition and regulation of intoxicating liquors by legislation. In times of peace, Congress had no constitutional authority to prohibit the possession of intoxicating liquors within a state; nor has it such power now except when the possession is incidental to the manufacture, sale or transportation of such liquors in violation of the Acts of Congress. The state, alone by virtue of the powers reserved when the constitution was adopted and as amended, have jurisdiction in such cases. Congress cannot invade this domain; being without constitutional authority. The Eighteenth Amendment authorizes Congress and the several states to enforce the prohibition against the manufacture, sale and transportation of intoxicating liquors; thus far Congress has power concurrently with the states and no farther. If it attempted to control possession intrastate, not incidental to manufacture, sale or transportation, its action would be without constitutional authority and a violation of the constitutionally reserved rights of the states. Hence, had Congress attempted to legislate such prohibition intrastate, its action would have been a nullity and no such taking of jurisdiction as could foreclose the jurisdiction of the state.

However, the National Prohibition Act does not invade this field, since its condemnation of possession extends authoritatively no farther than to give practical effect to its provisions making effective the constitutional prohibition of manufacture, sale and transportation of intoxicating liquors. This phase of the legislation has not been passed upon directly by the supreme court of the United States, but the final solution has been forecasted by the concurring opinion of Mr. Justice McREYNOLDS, in *Re Street v. Lincoln Trust Co.*, 65 L. Ed. 7.

Wherefore, the Eighteenth Amendment, not prohibiting the possession intrastate, when not related to manufacture, sale or transportation, and not giving Congress power to regulate such possession, it follows that the state occupies this field alone and, therefore, chapter 189 of the Laws of 1918, remains as it was, sufficient and untrammelled in the

punishment of possession of intoxicating liquors in Mississippi, a conviction under the chapter now is as valid as before the Eighteenth Amendment was adopted.

The amendment should not be given such construction as would virtually destroy the efforts on the part of the states to apply the principle of the amendment. The state should be given pause only when its laws contravene the essential purpose of the amendment.

“Concurrent power, here means equal power, except that where the state goes a shorter distance than Congress in carrying out the purpose of the amendment, the act of the legislature is void as a justifiable standard. See *Rhode Island v. A. Mitchell Palmer*, No. 16, 64 L. Ed. 612; *Ruppert v. Caffey*, 64 L. Ed. 138. The correctness of the foregoing conclusion seems to be clear from the consideration of: *Ex Parte Guerra* (Vt.), 110 Atl., 224; *Commonwealth v. Nickerson* (Mass.), 128 N. E. 273; *Ex Parte Ramsey*, 265 Fed. 950; *Jones v. Hicks* (Ga.), 104 S. E. 771; *Jones v. Hicks*, parallels the instant case perfectly. In two of the cases mentioned, like the one at bar, the state statute antedated the Eighteenth Amendment.

The state guards its reserved powers with the utmost fidelity and would view with apprehension an interpretation which would force the state from the field of legislation when Congress saw fit to act in a matter which therefore was subject to the regulation by the state only, and which laterly, by constitutional amendment was made subject to legislation by the United States and the states with concurrent power. The federal courts do not deny our jurisdiction nor do the state courts of last resort which have thus far spoken.

W. H. Cook, J., delivered the opinion of the court.

The appellant, J. B. Meriwether, was convicted in the court of a justice of the peace of Leflore county on a charge of unlawfully having in his possession and control intoxicating liquors, and from this conviction he appealed

to the circuit court. There he interposed a demurrer setting forth, among other things, that the laws of the state of Mississippi making the possession of intoxicating liquors a crime have been annulled and superseded by the Eighteenth Amendment to the Constitution of the United States and the act of Congress passed pursuant thereto commonly known as the Volstead Act (41 Stat. 305). This demurrer was overruled, and appellant was again convicted and sentenced, and from the judgment this appeal was prosecuted.

From the record in this case it appears without dispute that the liquors found in appellant's possession were not kept by him at a place or under circumstances which is permissible either under the terms of the National Prohibition Act or the prohibition laws of the state of Mississippi, and the sole question presented for decision by this appeal is whether chapter 189 of the Laws of 1918 has been repealed or superseded by the National Prohibition Act.

It is contended by appellant that, inasmuch as Congress, under the Eighteenth Amendment, has legislated in regard to the manufacture, sale, transportation, importation, and exportation of intoxicating liquors, the subject is entirely removed from state jurisdiction, and all state legislation upon the subject of prohibition has been repealed or superseded by the federal law.

Prior to the ratification of the Eighteenth Amendment to the Constitution of the United States, the legislature of the state of Mississippi had enacted legislation prohibiting the manufacture of intoxicating liquors, and prohibiting the possession of such liquors within the borders of the state except for medical and sacramental purposes. This legislation is embraced in chapter 189, Laws of 1918, and section 2 of this Act reads as follows:

"Sec. 2. That it shall be unlawful for any person, firm or corporation to receive or accept, directly or indirectly, from any of the common carriers, companies or persons mentioned in section 1 of this act, or to have, control or possess in this state or for any person to personally trans-

port or bring into this state or from place to place in this state, any of the liquors mentioned in section 1 of this act, whether intended for personal use or otherwise, or whether in the original package or otherwise, save as provided in section 12 of this act."

The Eighteenth Amendment to the Constitution of the United States became operative under its terms on January 16, 1920, and the amendment itself expressly reserves to the states concurrent power to enforce it by appropriate legislation. Sections 1 and 2 of the amendment read:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

It cannot be successfully contended that the prohibition laws of the state of Mississippi in any respect contravene the essential and dominant purpose of the amendment, or that the power exercised by the state under its prohibition laws is not in aid of the enforcement of the amendment, and this should be kept in view in construing the meaning of "concurrent power to enforce" in its relationship to the validity of the existing laws of the state of Mississippi relative to intoxicating liquors.

While it appears that the supreme court of the United States has not decided the exact question here presented, yet we think the conclusions announced by that court, and the discussion by Chief Justice WHITE in his concurring opinion, in the case of *Rhode Island v. Palmer*, 253 U. S. 387, 40 Sup. Ct. 488, 64 L. Ed. 946, strongly forecast the ultimate decision of the question of the validity of state legislation which is in aid of the enforcement of the amendment.

In *Rhode Island v. Palmer, supra*, the court simply announced its conclusion, without setting forth the reasoning by which they were reached, and the seventh, eighth, and ninth conclusions are as follows:

“(7) The second section of the amendment—the one declaring ‘the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation’—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

“(8) The words ‘concurrent power,’ in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

“(9) The power confided to Congress by that section, while not exclusive, is territorially co-extensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.”

The Chief Justice, in announcing his concurrence in the conclusions of the majority of the court in *Rhode Island v. Palmer, supra*, used the following language:

“In the first place, it is indisputable, as I have stated, that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such regulations and sanctions as were essential to make them operative when de-

fined. In the third place, when the second section is considered with these truths in mind, it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or the distinctions between state and federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the amendment and the legislation of Congress enacted to make it completely operative."

It will thus be seen that by conclusion 7 the supreme court of the United States has finally disposed of the contention that any state may by its legislation defeat prohibition, and expressly holds that section 2 of the amendment giving Congress and the several states concurrent power to enforce the amendment by appropriate legislation does not authorize Congress or the states to defeat or thwart the prohibition in section 1, but only to enforce it by appropriate means.

In conclusion 8 the court expressly held that the words "concurrent power" in section 2 of the amendment do not mean joint power, and that they do not mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

The contention that "concurrent power" means joint power, having been settled in the negative, it then remains to consider what is in fact the purpose and effect of the language of section 2 as applied to state legislation in the field of prohibition. The contention of appellant that, since Congress has entered the field of prohibition legislation, all state laws are devitalized, and the subject is entirely removed from state jurisdiction, is manifestly un-

tenable. This contention is in plain contradiction of the language of the amendment and would render section 2 of the amendment meaningless and purposeless. Undoubtedly Congress would have the power to enforce the amendment if section 2 had not been added thereto, and the evident purpose of the addition of this section was to guarantee to the states the right and power to enforce the amendment within their territorial limits and to unite the state and national governments in the enforcement thereof. In ratifying the amendment the states have expressly reserved the power to enforce it by appropriate legislation, and state legislation directed to the enforcement of prohibition is not affected by the fact that Congress has enacted legislation on the subject. Since the power to be exercised by Congress and the states is not a joint power, legislation by the states need not be identical with that of Congress in language, terms, means adopted, or punishment prescribed, provided it is directed to the enforcement of the amendment. Of course, the state cannot authorize that which is prohibited by Congress, and thus defeat legislation enacted by Congress, to enforce the amendment. The purpose of the amendment cannot be effected by granting rights and privileges thereunder, but it must be enforced by prohibiting the things forbidden by the amendment, and since the provisions of chapter 189 of the Laws of 1918 are in aid of the enforcement of the amendment, and contribute to the general aim and purpose thereof, we cannot assent to the view that any of its provisions are abrogated or superseded by the legislation of Congress. A contrary construction of this section of the amendment would defeat its obvious purpose and render the entire section meaningless and useless. That the construction which we have adopted accords with the purpose of Congress in proposing the amendment in its present form, and also with the understanding of the states when they ratified it, cannot be doubted.

In this connection it is interesting to note the origin of section 2 of the amendment, and the understanding of the

authors thereof as to its meaning, purpose, and effect. As the proposed Eighteenth Amendment originally passed the Senate, it provided that "the Congress . . . shall have power to enforce this article by appropriate legislation." When it was under consideration by the judiciary committee of the House of Representatives, section 2, providing that the Congress and the several states shall have concurrent power to enforce the article by appropriate legislation, was added. The reasons for inserting this section, and the object sought to be made certain thereby, clearly appear from statements of the chairman of the judiciary committee made at the time the amendment was under consideration by the House of Representatives. In the Congressional Record of December 17, 1917, at page 423, there appears a statement by Chairman Webb which in part is as follows:

"The first amendment adopted in the judiciary committee was the new section 2. As it passed the Senate it provided that the Congress should have the power to enforce this article by appropriate legislation. Most of the members, including myself, of the judiciary committee, both wet and dry, felt that there ought to be a reservation to the state also of power to enforce their prohibition laws; and therefore we amended the resolution by providing that the Congress and the several states shall have 'concurrent' power to enforce this article by appropriate legislation. . . . I believe, regardless of our division on the dry and wet question, every member will agree with us that this is a wise and proper amendment. Nobody desires that the federal Congress shall take away from the various states the right to enforce the prohibition laws of those states. If we do not adopt this amendment from the committee, there might be a fight in Congress every two years as to whether the states should be given the right to help enforce this proposed article of the Constitution."

Again, in a later statement Judge WEBB expressed the following views:

"My idea is that section 2 of the national prohibition amendment gives the federal government and the states the right to enforce the constitutional amendment in their own way. . . . Some wet states might not pass laws against the manufacture and sale of liquor at all, but their nonaction would certainly not prevent the prosecution of one of their citizens for violating the Volstead Act based upon the constitutional amendment. On the other hand, some states may pass a law so drastic that they will not permit any beverage to be sold which contains any trace of alcohol, and in such case the Volstead Act would not give such person immunity from prosecution under state laws. My understanding of section 2 of the amendment is that it makes both the state and the federal government sovereign in the enforcement of the prohibition law, and each sovereign has the right, so far as its jurisdiction goes, to enforce this constitutional amendment in its own way.

"I think this is the view that Congress took of the matter when the act was passed, and it is certainly the view which I took when I explained the meaning of section 2 to the House (December 17, 1917), when we passed the resolution by more than two-thirds majority.

"I cannot see any conflict of power or jurisdiction which might arise from the action or nonaction of a state, or from the action or nonaction of the Congress. Each has its sovereign jurisdiction and can exercise it in its own way."

Later there appears in the Congressional Record a statement by Congressman Volstead, who had become chairman of the judiciary committee, expressing his views as to the purpose and meaning of section 2, and in which the following language is used:

"The resolution proposing this amendment originated in the Senate; when it reached the House it was referred to the committee on the judiciary, of which I was then a member. It was there discussed among the members, especially among those who favored its adoption. It was, among other things, pointed out that if the amendment

should be adopted in the form in which it had passed the Senate its effect might be to repeal or enable Congress to suspend every prohibition statute in the country, and that it ought to be made the duty of the state as well as the national government to enforce it, as the states have courts and police forces equipped to do that work. Attention was also called to the fact that states and the federal government exercised the power to punish the same act each in its own courts and under its own laws. As this power has usually been spoken of by courts and law-writers as concurrent jurisdiction, and as it was to confer the like power on Congress and the several states, the phrase 'concurrent power' was adopted as expressing that idea. I do not know who wrote the provision, but I know that was the idea sought to be written into the amendment. . . . Any act left unpunished by a state may nevertheless be punished by the national government if such punishment tends to enforce the amendment, and likewise, to accomplish the same purpose, an act left unpunished by the national government may be punished by the state. . . . The object of making the power concurrent was to obviate the rule that where Congress acts under a granted power it has the effect of suspending or annulling state laws 'on the same subject. It was the intention that the power to enforce should concur in the sense that at the same time and to accomplish the same purpose Congress and the several states might make and enforce laws."

The question of the effect of section 2 of the amendment upon state legislation has recently engaged the attention of several of the state and federal courts, and in the conclusion that existing state laws are not abrogated or superseded by the National Prohibition Act there appears to be no disagreement. In the recent case of *Commonwealth v. Nickerson*, 236 Mass. 281, 128 N. E. 273, the Supreme Court of Massachusetts says:

"The amendment does not require that the exercise of the power by Congress and by the states shall be coterminous, coextensive, and coincident. The power is con-

current; that is, it may be given different manifestations directed to the accomplishment of the same general purpose, provided they are not in immediate and hostile collision one with the other. In instances of such collision the state legislation must yield.

"We are of opinion that the word 'concurrent' in this connection means a power continuously existing for efficacious ends to be exerted in support of the main object of the amendment and making contribution to the same general aim according to the needs of the state, even though Congress also has exerted the power reposed in it by the amendment by enacting enforcing legislation operative throughout the extent of its territory. Legislation by the states need not be identical with that of Congress. It cannot authorize that which is forbidden by Congress. But the states need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable also that a state may forbid under penalty acts not prohibited by the act of Congress. The concurrent power of the states may differ in means adopted, provided it is directed to the enforcement of the amendment. Legislation by the several states appropriately designed to enforce the absolute prohibition declared by the Eighteenth Amendment is not void or inoperative simply because Congress, in performance of the duty cast upon it by that amendment, has defined and prohibited beverages and has established regulations and penalties concerning them. State statutes, rationally adapted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverage contained in section 1 of the amendment by different definitions, regulations, and penalties from those contained in the Volstead Act, and not in conflict with the terms of the Volstead Act, but in harmony therewith, are valid. Existing laws of that character are not suspended or superseded by the act of Congress. The fact that Congress has enacted legislation covering in general the field of national prohi-

bition does not exclude the operation of appropriate state legislation directed to the enforcement by different means of prohibition within the territory of the state.

"The power thus reserved to the states must be put forth in aid of the enforcement, and not for the obstruction, of the dominant purpose of the amendment. It must not be in direct conflict with the act of Congress in the same field. Subject to those limitations growing out of the nature of our dual system of government, the power of the states is constant, vital, effective, and susceptible of continuous exercise. We think that these results follow from the words of the amendment, from the implications of conclusions 8 and 9 of the opinion in *Rhode Island v. Palmer*, and from the other decisions to which reference has been made."

Again, the case of *Jones v. Hicks*, 104 S. E. 771, recently decided by the supreme court of Georgia, is one which, upon its facts, exactly parallels the instant case, and there the court uses the following language:

" 'Concurrent power' does not mean 'concurrent legislation,' and concurrent 'power' to enforce is quite a different thing from 'concurrent enforcement.' 'The words "concurrent power" in that section do not mean "joint power," or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.' 'Appropriate legislation' by the Congress or the states, as employed in section 2, must be "to enforce," and not to "defeat or thwart.' . . .

"It may be suggested that concurrent power to enforce may result in one being twice put in jeopardy for the same offense, and that, if each of the forty-eight states retains the sovereign power to enforce the amendment, a lack of uniformity in the punishments may result. These questions likewise were thoroughly considered by the Congress,

as shown by the debates. The constitutional inhibition against being twice put in jeopardy for the same offense was also considered in *State v. Antonio, supra*, and, as suggested by the deliberations in Congress, it was said that the plea of *autrefois acquit* and *autrefois convict* would doubtless be applicable. We are not, however, confronted with that question at present. The lack of uniformity, it may be suggested, will be no greater than did obtain throughout all of the states prior to the ratification of the Eighteenth Amendment, where prohibition as to intoxicating liquors existed. Indeed, it may be said that this lack of uniformity obtains in the same state, as scarcely any two judges agreed exactly on a schedule of punishments; the statute having allowed a wide margin within which legal punishment might be inflicted. Under the terms of the Tenth Amendment to the Constitution of the United States, as universally construed, the states, prior to the ratification of the Eighteenth Amendment, possessed the exclusive power over this subject; therefore, when they delegated to the United States the 'concurrent power' to enforce the amendment, they delegated only a part of their sovereign power over the subject. They parted with none of their own power 'to enforce' prohibition within their own sphere of action. The amendment and legislation thereunder by the Congress does not impair the integrity of any existing state statute to enforce prohibition, nor can it interfere with the enactment of any future legislation by the states for that purpose. From a consideration of the question as above presented, we reject the view that the legislation of Congress will supersede and abrogate the laws of the state which are appropriate for the enforcement of the amendment. We conclude that the power of Congress and of the state is equal and may be exercised by the several states for the purpose of enforcement concurrently within their legitimate constitutional spheres. *Ex parte Guerra* (Vt.), 110 Atl. 224, and authorities cited. The first section of the amendment is in no way affected or

qualified by the words "concurrent power," found in the second section."

In *City of Shreveport v. Marx*, 86 So. 602, the supreme court of Louisiana says:

"It follows that, unless there be some conflict in the act of Congress with that of the state, the article in question itself affords a complete answer to the contention since state legislation would only have to yield to that of Congress because of the paramount authority of the latter in enforcing the federal Constitution. The purpose both of the amendment and the Volstead Act was and is the enforcing of prohibition, and only such legislation as might tend to defeat that purpose would produce such a conflict; while, on the other hand, any law which had the effect of aiding in its accomplishment could not be said to impede either amendment or statute, although the state statute might provide additional or identical means to the common end; otherwise the clause giving concurrent power to the states to enforce the amendment would be meaningless. It is true that the Act No. 8 of 1915 was in force when the Eighteenth Amendment and the Volstead Act became effective, but nothing therein has been pointed out, nor have we been able to find anything in the state law with which they conflict."

See, also, *Ex parte Guerra* (Vt.), 110 Atl. 224; *Ex parte Ramsey* (D. C.), 265 Fed. 950.

We conclude, therefore, that chapter 189 of the Laws of 1918, prohibiting the manufacture or possession of intoxicating liquors within the state of Mississippi, has not been abrogated or suspended by the National Prohibition Act, and that the jurisdiction of the state courts to enforce the provisions of the act is in no way affected thereby. It follows that the action of the court below in overruling the demurrer to the affidavit was correct, and that the judgment will be affirmed.

*Affirmed.*

ALABAMA & V. RY. CO. v. JOSEPH *et al.*

[87 South, 421, No. 21627.]

1. ADVERSE POSSESSION. *Possession must be exclusive, under claim of right, and for statutory period; city using railroad right of way as street held to acquire title to extent of use only.*

To acquire land by adverse possession, the possession must not only continue for the statutory period, but it must be exclusive and under claim of right; and, where a city uses a portion of a railroad right of way as a street for the passage of pedestrians and vehicles only, not excluding the railroad from the said land, it acquires only to the extent of the use, and has not right to place structures on the land, nor to permit others to do so.

2. ADVERSE POSSESSION. *Running trains over railroad right of way held use of entire right of way in absence of inclosure by adverse claimant and adverse use.*

The running of trains over the right of way is a user of its entire right of way, unless some part is inclosed by the adverse claimant and used adversely to the railroad for the statutory period.

3. LIMITATION OF ACTIONS. *Limitations may be set up by person entitled, and is not available by mere licensee of such person.*

As a general rule, the statute of limitation is personal to the person entitled to plead it, and cannot be set up by a third person who has acquired no property interest in the property. It is not available by a mere license of a person who might claim thereunder, but has not done so.

APPEAL from chancery court of Hinds county.

HON. V. J. STRICKER, Chancellor.

Suit by the Alabama & Vicksburg Railway Company against A. Joseph and others. Decree for defendants, and complainant appeals. Reversed and rendered.

*R. H. & J. H. Thompson and Fulton Thompson, for appellant.*

The chancellor necessarily found and adjudged that the statute of limitations sought to be pleaded by the defend-

ants who erected the shed were unavailing as a defense, as of course they were. That the railway company had been in possession of its land, a part of its right of way, all the time following the condemnation judgment in January, 1903, cannot be disputed under the facts or the law of the case. See *Sprowle v. Alabama etc., Ry. Co.*, 78 Miss. 88; *Paxton v. Yazoo, etc., R. R. Co.*, 76 Miss. 536; *Wilmot v. Yazoo, etc., R. R. Co.*, 76 Miss. 374, 24 So. 701, 24 So. 536.

Many authorities are to the effect that the statute of limitations will not deprive a railroad of the right to eject persons from its right of way under any circumstances. See *Southern Pacific Co. v. Hyatt*, 132 Cal. 240, s. c. 54 L. R. A. 552; *Roberts v. Sioux City, etc., R. R. Co.*, 2 L. R. A. (N. S.) 272.

This court, however, does not go so far; but in the *Wilmot case*, *supra*, it has decided that the adverse possession that will defeat the recovery of the easement of a railroad company in land constituting its right of way, on the expiration of the period of limitation, must have been distinctly manifested by acts hostile to and inconsistent with the possession of the company. The first and only hostile act by defendants Joseph and George was the erection of the shed in 1916, less than two years before the beginning of this suit. The defendants who erected the shed cannot invoke the statute of limitations were it available to another, unless they held the land under that other but in this case the city does not and never did claim adversely to the railway company and said defendants do not claim under the city; and besides the statute has never run against the company in favor of the defendants or anybody else.

For these reasons we ask a reversal of the decree appealed from and the rendition by this court of a final decree in appellant's favor awarding it all the relief prayed for in its bill of complaint.

*Burch & Enochs*, for appellee.

The period of acquiring an easement of land by a user corresponds to the statute of limitations conferring title by adverse possession, and in this state is ten years. (Citing *Bonelli Bros. v. Blakenmore*, 66 Miss. 136.)

We know of no stronger authority in support of the appellee's contention here than the case cited by the appellant, *Parton v. Yazoo, etc., R. R. Co.*, 76 Miss. 535. In that case the court said: "One who obtains the actual adverse possession of a part of a railroad company's right of way, and who, claiming to own the same, excludes the company therefrom, and holds in hostility to the true owner for ten years, acquires title by virtue of such holding, under Code 1892, section 82734, making the statute of limitations invest title."

The appellant railroad company sits idly by for sixteen years and sees the city of Jackson spend thousands of dollars in the improving and paving of this public highway; for this length of time, it sees the general public daily using same, and not one word has it uttered to the contrary. If there is any such thing as acquiring land by prescription under the laws of this state for the use of the public, it does seem that the facts in this case not only comes within the protection of such law, but clearly demonstrate its necessity.

The appellant says that its sole purpose in having this court declare the title of this property in it is to relieve itself of a nuisance and to throw the arm of protection around the traveling public as it passes to and fro over its railroad. But the appellant is not bound by this assurance should this court declare the appellant the owner of this triangular strip of land. The appellant could, on the day following the rendering of this honorable court's opinion, block North Gallatin Street and drive the traveling public therefrom.

The attorney for the appellant lays great stress upon the fact that the city of Jackson was made a defendant to

this proceeding, but allowed the railroad company to take judgment by default. The writers of the great common law seem to have anticipated that municipal governments would at times fall into the hands of indifferent officials, and so fixed the law that their indifference to the rights of citizens would not interfere with such citizens' rights to the use of the public highway, for this court said in the case of *Railroad Company v. Thomas*, 75 Miss. 54:

"Where a railroad company impliedly dedicates a part of its right of way in a city to the public as a street and permits the city to treat, and the public to use, the same as a street for more than thirty years, it is bound by the dedication and may be enjoined, from an unauthorized laying of tracks thereon, by an abutting property owner who would suffer special damages thereby." So it will be seen that in that case an abutting property owner to a street was dealing with a railroad company with reference to the use of the streets of a Mississippi town, and this court held that he had a right to assert his claim with reference to the said street, in his own name, and not in the name of the city.

To sum up this case as a whole, the railroad company comes into this court without citing one single authority in support of its contention, and boldly asks this court to vest it with title to a portion of one of the streets of the city of Jackson, in the face of a record that shows clearly that the property it is asking for is just as much a legal street as any other street in this city.

We respectfully submit that under the facts of this case it should be affirmed on direct appeal and reversed and dismissed on cross appeal.

ETHRIDGE, J., delivered the opinion of the court.

The appellant brought suit against the appellees and the city of Jackson to cancel any claim or ownership in a certain strip of ground in the northeast angle of the intersection of Capitol street and Gallatin street in the city of

Jackson, the appellant having through condemnation proceedings condemned the strip of land for railroad purposes in the year 1903. The streets cross approximately at right angles, Gallatin street running east of north and west of south, and Capitol street running north of west and south of east, and the railroad track runs approximately southeast and northwest at this point. Shortly after the railroad condemned this strip of land the city of Jackson paved Capitol street and subsequently Gallatin street, and laid pavement over a portion of the land embraced in this angle, condemned as above stated, and the public has used the part so paved as a part of the street. The railroad company acquired this strip of land principally for the purpose of throwing vehicle traffic off of its tracks, it having three tracks within the intersection of these streets. It also acquired it for the purpose of keeping said space free from obstructions so that its engineers could better see persons and vehicles approaching the railroad track from either street.

Prior to the year 1916 there was a frame building occupied as a market in the northeast angle of Gallatin and Capitol streets north of the strip of ground condemned by the railroad. In 1916 A. Joseph & Co., the appellees, constructed a brick building up to the line of the said strip heretofore condemned, and laid a sidewalk on the part of the said strip next to the private property line, and erected a metal awning or shed some eight feet from the surface of the walk constructed, which awning is approximately flat. The proof shows that engineers approaching the crossing from the west cannot see vehicles approaching on Capitol street going northwest, and that engineers approaching from the east cannot see portions of North Gallatin street, formerly Clark street, approaching from the northeast.

The city of Jackson made no defense to the suit, and a decree *pro confesso* was taken against the city. The other appellees, who were defendants, answered, denying the allegation that the railroad company was entitled to the

land embraced in this angle, setting up that the city of Jackson has acquired an easement for a street by adverse user over this lot of ground, and that the said defendants had permission from the city to erect the said awning over the said land. It is denied, further, that the awning obstructed the view of the engineers, and it was contended that the railroad kept a flagman at this crossing, and that the engineers would obey the flagman's signs, and that the awning in no wise interfered with the operation of the engines of the complainant.

The proof shows that about eight regular engines pass this crossing each twenty-four hours, and that numerous switching engines cross daily, the yards of the complainant being to the west of the crossing and its freight station to the east of said crossing. The chancellor decreed that five feet on each end of the awning obstructed the vision from the engines and constituted a nuisance, and ordered the awning abated to that extent. The decree recited:

"It appearing to the court from the evidence that the city of Jackson had acquired an easement by dedication and user in said property for a street and sidewalk, and that the rights of the city being coextensive with all that said easement confers as such upon the city, including the right to permit a shed over said sidewalk, which it appears said city did and does permit and of which it makes no complaint," etc.

It appears from this recital of the decree that the chancellor's view was that, inasmuch as the city had acquired an easement by user, it had power to permit the awning to be placed upon the said property. The law is that to acquire title to land by adverse possession the possession must not only continue for the statutory period, but it must be exclusive and under claim of right. The proof does not show that the railroad was excluded from this property at all by the city. The railroad was constantly in use of its tracks, and using the property for the purposes for which it was acquired, and the facts show that both the city and the railroad company were making such

use of the strip of ground in question as would not interfere with the railroad's rights. Under these circumstances the city merely acquired such rights as the use vested in it. That is to say, a mere right of passage over the ground for persons and vehicles, and not the right to obstruct or erect any building upon the ground. It had acquired no right to erect sheds over the ground, and, of course it could confer none upon any other person. In *Parton v. Y. & M. V. R. R. Co.*, 76 Miss. 536, 24 So. 536, this court said:

"The railroad company does not lose its title to the right of way by a mere nonuser, and the running of trains is a constant assertion and occupancy of its right of way to its full extent as granted, so as to preclude a loss of it except by a strictly hostile possession of it for ten years."

In *Wilmot v. Y. & M. V. R. R. Co.*, 76 Miss. 374, 24 So. 701, this court said:

"The duties imposed by law upon a railroad company of safely carrying persons and property and of protecting employees and other persons lawfully upon the right of way from dangers arising from any obstruction or hindrance of the servants of the company in the performance of their duties, and the responsibility laid upon the company for the performance of such duties, require the right and power in the officers of the company of excluding at their pleasure all persons from the right of way. The occupancy of the right of way by the railroad company is practically exclusive, and the owner of the servient estate could cultivate it only by the consent of the railroad company."

As a general rule a third person cannot assert title for a defendant setting up the statute of limitations. But to make the statutes of limitations applying to the possession of another person available, a property right as distinguished from a mere license must exist. In the present case the city of Jackson made no defense, and asserted no claim to the property in question, but as under the law of this state the officers of the city are under duty to plead

the statutes of limitation where rights have accrued thereby to the municipality, the failure of the city to plead in this case will not foreclose that question in any future proceeding, because the proof shows that there was a constant user for passage of a portion of the strip of land involved as a street. And to this extent the judgment will save such rights as the city may have. But it is clear from the facts that the defendants Joseph and George have acquired no rights as against the railroad company, and the judgment of the chancellor will be reversed, and a judgment entered here for the complainant as prayed for against the defendants Joseph and George.

*Reversed, and decree here.*

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TONKEL v. SHIELDS.

[87 South. 646, No. 21625.]

1. **PAYMENT.** *Application where payments made at different dates and before maturity under contract to apply proceeds on debts stated.*

Where a party bought lands on deferred payments making a series of notes and providing that interest on all notes shall be payable annually, and further providing that the buyer may sell timber on the lands sold and apply the proceeds on the notes *pro rata*, and where timber is sold and the proceeds applied to the debts at different dates and in different amounts, such payments should be applied first to paying the accrued interest on all the notes to the dates of payment, and then in reducing the principal by prorating it among the notes. This is especially true where none of the notes are due at the date of the payments.

2. **MORTGAGES.** *Foreclosure sale will be enjoined where tender by check sufficient, although money not actually paid into court.*

Where, in such case, the maker of the notes tenders to the holder in good faith the amount claimed to be due by her, by check, which is not accepted, but refused on the ground that the amount is not sufficient, and not on the ground it is not money, and the

proof shows that the money was in the bank to the credit of the drawer of the check, and that it would have been paid if presented; and, where under the contract the holder of the mortgage and notes attempts to advance the unmatured debt on a theory of default, and advertises the property for sale, an injunction will lie to destrain the sale, and this is true though the bill only offers to pay the amount due, and does not actually pay the money into court, as the complainant should ordinarily do.

APPEAL from chancery court of Sunflower county.

HON. E. N. THOMAS, Chancellor.

Bill by Mrs. Ollie Shields against M. Tonkel to restrain sale under a deed of trust. Decree for plaintiff, and defendant appeals. Affirmed.

*A. W. Shands, J. C. Walker and Montgomery & Crisler,*  
for appellant.

The only point involved here is as to the correct method of application of these payments. We readily concede that the rule in Mississippi, in the absence of any application of payments on an indebtedness by either debtor or creditor, is that the law appropriates the same most beneficially to the debtor. *McLaughlin v. Green*, 48 Miss. 175; *Neal v. Allison*, 50 Miss. 175; *Windson v. Kennedy*, 52 Miss. 164.

The entire indebtedness of Mrs. Shields to M. Tonkel being represented by a series of secured notes to apply these sundry payments most beneficially to her would mean to apply them in such a way as to cause her to pay the smallest amount of money in the liquidation of her indebtedness.

This is the manner in which the payments were applied by Mr. Tonkel. By crediting the principal of the note due January 1, 1920, with the payments as the same were made during 1919, leaves a balance due on the principal on January 9, 1919, of three thousand seven hundred sixty-five dollars and twenty-four cents and one year's interest of

three hundred eleven dollars and fifty-two cents, after deducting total amount of interest on the several payments from the dates made to January 9, 1919, amounts to thirty-one dollars and twenty-six cents, leaving a balance of interest due on this note of two hundred eighty dollars and twenty-six cents. This added to the balance of the principal leaves a total of principal and interest due on this note by Mrs. Shields, on January 9, 1919, of four thousand forty-five dollars and sixty-two cents. (This computation is shown on page 66 of the record.)

Thus applying the payments in the manner as contended for by the appellee, as shown on page 59 of the record, we find a balance of three thousand nine hundred ninety-eight dollars and seven cents due on the principal of the note on January 9, 1919, and fifty-five dollars and twenty-three cents interest, making a total balance on this note from that date of four thousand fifty-three dollars and thirty cents.

So it will be seen by applying the payments as the same was applied by the appellant Tonkel, there was seven dollars sixty-eight cents less due on Mrs. Shield's note on January 9, 1919, than was due if the payments were applied as contended for by appellee, as shown on page 59 of the record.

Therefore, under the rules laid down by this court and consistently followed in its practice, the method of application of the payments adopted by appellant Tonkel in this case was the most beneficial to Mrs. Shields, the debtor, and was therefore correct.

This court, we think, has announced this as a correct principle in its case. *Scott v. Cleveland*, 33 Miss. 447. The case of *Star v. Richmond*, 38 Ill. 276, 83 Am. Dec. 189, is a case which is identically similar to the case at bar in principle.

In reversing the judgment of the lower court in the case based upon the report of the master, the supreme court of Illinois stated the rule as follows: "It appears to be more equitable and just that when the holder receives money

before it is due on demand drawing interest that it should be applied, in the absence of an agreement to the contrary, to the principal. Otherwise, by lending the sum thus received he would in effect compound the interest or have placed at interest before its maturity a larger sum than his original claim. In other words he would receive interest on the maker's money as well as on his own. After the principal and interest both become due it would be otherwise. The court below, we think erred in applying any portion of the payment made before the maturity of the note to the extinguishment of interest but should have appropriated the whole of the payment to the principal." See, also, *Davis v. Fargo Clark* (N. Y.), 470; *Ross v. Rees*, 19 Ky. Law, 1215, 43 S. W. 215.

No sufficient tender of any character was ever made by Mrs. Shields of the amount admitted by her to be due Mr. Tonkel. Several days after the due date of the interest, Mr. Fletcher, business agent of Mrs. Shields, sent to the Bank of Shaw and to Mr. Tonkel checks for the amount he contended was due to Mr. Tonkel, which checks in each instance were promptly returned to him. No money nor currency was ever tendered or offered to be tendered, the mere mailing of the checks, as above stated, being the only offer of payment made by Mrs. Shields or by Mr. Fletcher for her to pay the amount of interest which she was due.

It is too elementary to require citation of authorities that an offer to pay money by check or draft is not a tender sufficient in law. *Collier v. White*, 67 Miss. 133.

Not having paid or sufficiently tendered even the amount admitted by Mrs. Shields to be due up to the time Mr. Tonkel exercised his option to declare the entire indebtedness due, Mrs. Shields could not prevent foreclosure by paying the amount of interest due up to January, 1919, but could only prevent foreclosure by paying the entire indebtedness both principal and interest. After the debt has been declared due it is too late for the defaulting debtor to perform his broken covenant and restore his previous status. Before the option is exercised to declare the

debtor in default he may be relieved by performance. After declaration of maturity the status is fixed and performance does not reinstate the original maturities of the debt. *Caldwell v. Kimbrough*, 91 Miss. 909.

The only offer to pay anything by Mrs. Shields having been made through the medium of checks or drafts, which were promptly returned, we think it beyond dispute that no tender which was sufficient in law was ever made by her before Mr. Tonkel declared the entire indebtedness due under the terms of the trust deed. For this reason there is no equity in the bill.

The amount of money admitted by Mrs. Shields to be due is not paid into court with her bill. In order to claim the benefit of a tender, the tender once made must be kept good. This principle was reannounced by this court in the case. *Crittenden v. Ragan*, 89 Miss. 185; *M. & O. R. R. Co. v. Mosley*, 52 Miss. 137; *Lewis v. Bogue Chitto*, 76 Miss. 356; *Rush v. Pearson*, 92 Miss. 153.

The equity of the rule requiring tenders to be kept good by paying the money into court is peculiarly emphasized by a consideration of the rule in connection with a decree entered by the chancery court in this case. The rule requiring the tender to be made by the payment of the same into court is just and equitable; is a firmly established part of our jurisprudence and must be complied with by a person seeking injunctive relief.

The contract in this case was fairly and voluntarily entered into by the parties. The appellant Tonkel was well within his rights in accelerating the maturities of the several notes upon the failure of Mrs. Shields to pay the interest due thereon the due date thereof. *Caldwell v. Kimbrough*, 91 Miss. 877; *Taylor v. Alliance Trust Co.*, 71 Miss. 694; *Denton v. Sharp*, 71 Miss. 850; *Toler v. Gray* (recently decided, opinion not published).

First. The payments made, arising from the sale of the timber from the mortgaged premises in August, September and October, 1918, were properly credited on the prin-

cipal and Mrs. Shields never at any time in any manner offered to pay the amount due by her as interest on the indebtedness on January 9, 1919.

Second. There was never any tender sufficient in law made by Mrs. Shields or any one for her. The only offer to pay any sum ever made by her was by check or draft, which does not constitute a tender sufficient in law.

Third. Mrs. Shields fails to pay into court the amount admitted by her to be due, which failure to pay the money into court operates as an abandonment of any alleged tender made by her.

For these reasons Mr. Tonkel had a right to exercise his option to declare the entire indebtedness, both principal and interest due and to foreclose to enforce payment thereof. The decision of the learned chancellor in this case was erroneous.

We ask that the decree entered herein be reversed, the motion to dissolve the injunction sustained, the bill dismissed and the appellant awarded his proper damages.

*Everett & Hairston and Moody & Williams, for appellee.*

It is conceded that the payments were not applied either by the appellants or the appellees, and therefore the law applied it most favorably to the debtor, and credited all payments that were made on the note that was due January 1, 1920, and in order to ascertain the amount due figured interest on this note for one year and allowed the interest on the payments that were made. The statement, according to this application will be found at page 66 of the record.

Counsel for appellants, in applying the rule that applications will be made in the manner most beneficial to the debtor arbitrarily states that it would be most beneficial to the creditor to settle according to Tonkel's figures on January 1, 1920, but he overlooks, in this settlement, the fact that the first principal note was not due until January

1, 1920, and that this controversy arose in trying to arrive at what was the just interest due on January 1, 1919. We take it that if separate notes had been executed, representing the interest, accruing on this contract, as hereinabove set out, and if appellee had executed her note for one thousand five hundred seventy-seven dollars and fifty-two cents, evidencing the interest payment, which was due under the contract of January 9, 1919, there would be no contest on but that the payments made in the year 1918 should be applied to this note.

We think it is evident that the notes and trust deed must be construed together, as evidencing the entire contract of the parties and considering the fact that no separate interest notes were executed and there was a debt due of one thousand five hundred seventy-seven dollars and fifty-two cents, maturing on the 29th of January, 1919, the rights of the parties were the same as if a separate note had been executed. It will be noted that the payment of this interest due January 9, 1918, was compulsory. If it was not paid, appellee stood a chance to lose her property.

So it occurs to us that the method of calculating, by which the least payment on January 9, 1919, appellee could save her property would be most beneficial to her. But aside from this consideration, under the law, the payment is applied to the debt first maturing. Consideration of the different payments necessary to be made by Mrs. Shields to carry out her contract in this case clearly demonstrates that the first debt maturing was the debt for interest in the sum of one thousand five hundred seventy-seven dollars and fifty-two cents, due January 9, 1919. Even if she had paid all the note due January 1, 1920, without paying the interest accruing January 9, 1919, she could not have saved her property. "Except where equitable principles require a different disposition thereof or where a different application has been made by the parties themselves, it is a well settled rule that a payment should be applied by the court to the oldest debt where

there is more than one debt, that is, the debt first becoming due." 30 Cyc., 1243.

If this rule had been followed without allowing appellee anything for interest on her payments from the time they were made until January 9, 1919, the debt due January 9th would have been reduced to one hundred and fifty dollars and seventy-six cents, and appellant cannot complain since an amount largely in excess thereof was offered to him.

In 30 Cyc., at page 1249, this rule is announced: "Except where otherwise agreed, a payment made on an indebtedness consisting of principal and interest, not applied by either the debtor or creditor, will be applied first to the interest due and then to the principal."

We think it clear that the text writer had in mind a case where the principal debt and the interest on same matured at the same time, and that this is in conflict with the principle holding that the first debt due should have preference in the application of payments. 30 Cyc. 1250.

The text in ruling case law is squarely supported by the case from the supreme court of Indiana in *Jacobs v. Balenger*, 15 L. R. A. 169. We take it that in view of the above authority, the appellee was entitled to have discharged from her payments, first interest accrued at the time of the payments, and the balance of each payment to be applied to the principal of the debt, and while she might have contended for more, certainly she was entitled to this much.

Sufficiency of the tender. The testimony shows that Mrs. Shields' agent offered the money to Tonkel in sufficient amount, she tendered the money into court with her bill, and shows without controversy that she had been ready all the time to pay the money, if Tonkel, or his attorneys would take it.

Also that when the checks were returned by Tonkel they were returned solely on the ground that they were not the right amount, and no objection was made to the fact that payment was made by check. Also it was shown that the

checks were perfectly good. The supreme court of Mississippi, in the case of *Wesling v. Noonan*, states: "It is next urged that the plaintiff, at the time he offered to pay the charge on the articles purchased, did not make, in a legal sense, a tender of money; inasmuch as the money was not counted, or in fact offered to the defendant. The rejection of the proposition by the defendant, rendered it unnecessary to count the money or to make any further tender of it. It was equivalent to saying to the plaintiff, that his money would not be received if actually offered. 31 Miss. 599. This is the general law on the subject. 38 Cyc., 145; *Bonaparte v. Thayer* (Md.), 52 Atl. 496, 26 R. C. L. 638.

In the present day it is a matter of common knowledge that practically all the business that is transacted is handled on checks, and it is clear that, in this case, the tender made was amply sufficient. We have no quarrel with the authorities cited by counsel as to the acceleration of payments, because that question is not involved in this case since the record shows that all amounts due were offered to Tonkel at the time due.

In this case the property bought by the appellee had greatly enhanced in value and it appears that what appellant wanted was not the money due him on the contract, but the forfeiture of the contract, in order that he might regain possession of the property. We do not think a court of equity could lend its aid to a scheme of this sort, but that the court below properly decreed that the injunction should be made perpetual. The court will bear in mind that the controversy here is not over the money due on January 9, 1919, but as to that the record shows that appellee has always been ready and willing to pay this money if Tonkel would receive it; but the proposition is, whether or not she had made default, and appellant was entitled to foreclose his trust deed. If he was entitled to foreclose it and we submit that appellee had made every effort to get a fair adjustment of the proposition and pay every cent that was due, then the injunction

was rightly sued out and rightly made perpetual. The chancellor heard the evidence, observed the witness and from that drew his conclusions, holding that the appellee had endeavored in every way to comply with her agreement and had not forfeited any right; that she was prevented from complying with it strictly by appellant arbitrarily refusing to accept the money. That being the case, we respectfully submit that the decree appealed from should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

The appellee filed a bill for injunction to prevent the appellant from advertising and selling certain lands under a deed of trust executed by the appellee to the appellant for the purchase money of certain lands. The deed of trust was for twenty-six thousand five hundred dollars and interest payable annually on all of said notes on said date, and the notes called for attorney's fees, etc. It was further stipulated in the deed of trust that if the grantor therein failed to pay the said notes or any of them or any part thereof, or all or any part of the annual interest thereon when due, or failed to carry out the covenants and agreements therein contained, that the lands might be sold at public outcry, etc.

It was further agreed that the grantor in the deed of trust, the appellee, or her assigns, shall have the right to cut and remove all of the merchantable timber located on said lands and to dispose of same, provided and with the understanding that she should apply to the credit of the above notes the following *pro rata* of all of the proceeds derived from the sale of said timber, that is to say five dollars per thousand feet for all red and white oak, ash, and hickory removed from said lands; that said payments applied on said notes were to be made as soon as the timber was placed on a railroad right of way and a sale made thereof, and that as soon as such sale is made that a credit shall be immediately placed in the Bank of Shaw, of Shaw,

Miss., to the account of M. Tonkel, or the holder of said notes, to be applied to the payment of the notes therein secured. It was further stipulated that in case the timber was sold and diverted without the consent of Tonkel or the holder of the notes that Tonkel or the holder of said notes may then, at any time thereafter before the debt is fully paid and satisfied, request the trustee to take possession and make a sale.

After the execution of the deed of trust the appellee sold certain of the timber, and paid, or caused to be paid, the amount stipulated to the Bank of Shaw, said amount being paid at different times during the summer and autumn of 1918, and were placed by Tonkel or the bank as a credit on the note first maturing. Just prior to the time the first payment was due appellee's agent called up the Bank of Shaw and requested the bank to send a draft for the amount of interest due to the Bank at Indianola, Miss., and that same would be paid by said agent. The Bank at Shaw thereupon made out a draft for one thousand five hundred and forty-six dollars and sent it to the Bank at Indianola, Miss. Mr. Fletcher, appellee's agent, caused the draft to be returned, with notation indorsed thereon that it was for too much, and that the correct amount due was one thousand three hundred and twenty-one dollars and ten cents, and that he would honor a draft for that amount. The Bank at Shaw thereupon made out a second draft for some amount slightly different from the original draft, and returned that to the Bank at Indianola. The appellee's agent indorsed on that draft that it was still too much, and that the true amount, according to the calculation of himself and the cashier of the Bank at Indianola was that it should be for one thousand three hundred and twenty-one dollars and ten cents, and that he would pay that amount. Afterwards Fletcher sent a check for one thousand three hundred and twenty-one dollars and ten cents, payable to the Bank at Shaw or bearer, with notation, "Interest on notes due M. Tonkel by Mrs. Ollie Shields." This check was returned and, on

the 31st day of January, Fletcher wrote the Bank at Shaw inclosing a check for one thousand three hundred and twenty-one dollars and twenty-three cents for interest due M. Tonkel on the note due on the 9th of January by Mrs. Ollie Shields, and in which he stated that he had very carefully gone over the calculations and sent the dates and amounts of the credits upon which he based his calculations of the amount then due. On February 2d Fletcher wrote M. Tonkel a letter, stating that he had offered to pay one thousand three hundred and twenty-one dollars and twenty-three cents a second time, and that his check has been returned to him, stating that Tonkel had refused to accept the same, and stating, further, that he did not know how Tonkel figured the interest, but that he (Fletcher) had figured it very carefully, and then had the bank to figure it, and that their figuring corresponded, and stated that he was returning the check, and, if Tonkel would advise him how he figured the interest and show that Mrs. Shields owed more than the amount of the check, that he would be glad to send the balance. On February 4th this letter was answered by Mr. Tonkel's attorney, stating that the notes had been turned over to him for collection, and that Tonkel had exercised his option on the deed of trust and declared the entire indebtedness due and payable, and that he would enforce the payment of the entire amount, and saying, further, that the indebtedness was payable at the Bank of Shaw, and that it was Fletcher's duty to come there and adjust the matter if he had any grievances, and that it was not Mr. Tonkel's duty to come to him; that the matter had dragged along a month past due and that the collection would be foreclosed by foreclosure proceedings, stating:

"It looks like you are hankering for a lawsuit and, if so, we will accommodate you."

Appellee's attorney answered this letter, stating that he had sent the amount of one thousand three hundred twenty-one dollars and twenty-three cents, the amount of interest due according to the appellee's way of figuring, and that

Mr. Fletcher had offered to pay the amount and also any other amount due if Mr. Tonkel would only show him his way of figuring the interest; that the difference between them amounted to more than two hundred dollars, but Mr. Tonkel preferred to try and foreclose the deed of trust when not a single note was due rather than to enter into a discussion about the matter to show how he figures Fletcher out of two hundred dollars more interest than Fletcher can figure the same; that they were willing to pay Tonkel what was due, and have been willing to do this, and offered it to him; that they were willing to pay the full pound of flesh, but did not propose to give any blood, as the bond does not stipulate for it.

Foreclosure proceedings were instituted by advertising the property for sale, and an injunction followed; the bill offering to pay the amount due, but not actually carrying the money into court. A motion was made to dissolve the injunction, and evidence taken thereon showing that applying the payments on the partial payment plan by reducing the interest then accrued sustained the complainant's position; the appellant showing that applying the payments according to the partial payment rule, first paying the interest accrued to the time of the payment and the balance on the principal, and calculating new interest on the new principal so obtained to the next payment, and so on, sustains the complainant's theory as to the amount really due at the time. The appellant's contention was and is that the payments were applied on the principal, and that he was not called on to apply it to the interest other than the first note due, and that, so treating it, his contention of the amount of interest due would be correct. Appellant also contends that there was no tender of any money at all, that a check is not good as a tender, and, as the money was not tendered, that he was acting within his rights in advancing the maturity of the deferred note under the terms of the deed of trust. He also contends that no money was paid into court, and that for this reason it was error to sustain the contention of complainant, and

refused to dissolve the injunction. Under the terms of the instrument the entire interest was due annually, on the 9th day of January, 1919, and each year thereafter. and that the 1919 interest payment was the first indebtedness in point of time which matured.

We think the correct rule to apply in the present cause is to apply each payment to the amount of interest which had accrued or been earned on the entire series of notes to that date, and, if any was left, then the balance to be prorated among the several notes in accordance with the stipulation in the deed of trust. Our statute on partial payments (section 2681, Code of 1906, section 2079; Hemmingway's Code) provides as follows:

"When partial payments are made, the interest that has accrued to the time of payment, if any, shall be first paid, and the residue of such partial payment shall be placed to the payment of the principal."

The words in the statute, "the interest that has accrued to the time of payment," mean that the interest that has been earned, though it may not be yet due, will be first paid.

The general rule in applying payments is that it is applied to the item that first matures in the absence of any stipulation as to how it is to be applied, or any actual application of it at the time of the payments. This construction of the statute is in accord with the chancellor's view on this question as reflected in the result of his decision. This being true, the complainant was not in default as to the amount due. There was no rejection of the check because it was a check and not money. It is quite clear that the check was not accepted solely because it was not for the amount contended for by the appellant. The proof shows that the check was absolutely good, and would have been promptly paid, the appellee having the money in the bank for this purpose, and if the check had been declined on the count that it was a check and not money, it would have been promptly replaced with money. However, that question would not have arisen in this case had

the appellant drawn his draft for the correct amount, for the bank would have paid the draft with money if demanded. Whether the amount offered in the check by the appellee was the correct amount or not as a fact, it is quite clear from the record that the appellee believed in good faith it to be the correct amount, and the stipulations in the deed of trust, giving the grantee the right to advance the payments after a default in the payment, never stipulated that he would have a right to advance them, and make all of them mature when there was a *bona-fide* dispute between them as to the correct amount, and this is especially true where a party declines to disclose his method of figuring the amount due. This being true, and the appellant having undertaken to foreclose the mortgage when he had no right so to do, the injunction was properly issued to prevent his so doing. The bill offers to pay the amount, and the appellee had repeatedly offered and tried to get accepted the payment of the amount which he claimed was due, and had utterly failed to get the appellant to show wherein his figures were wrong.

While the proper practice is always to pay an amount conceded to be true into court with the bill, a failure to do so in the present case would not prevent the injunction being retained, because it is perfectly evident from the record that the money was available to the appellant at any time he chose to take it. He was seeking to take a drastic step by advancing all the notes to maturity, and in so doing he was seriously handicapping the appellee in handling the property in order to carry out her contract with himself. It would seem from the record that the property subsequent to the sale to the appellee had repeatedly advanced in market value, and that it would be very profitable to the appellant to acquire this property, and greatly damaging to the appellee to have to pay all of this money because of a slight discrepancy, relatively speaking, between the contentions of the two parties. We believe the chancellor reached the correct conclusion on the facts of this record, and the judgment will be affirmed.

*Affirmed.*

## HINES, AGENT v. GREEN.

[87 South. 649, In Banc, No. 21567.]

1. MASTER AND SERVANT. *Assault on servant by another servant in course of employment actionable.*

Where a master employs a dangerous, quarrelsome, and vicious servant, or retains him in his service after knowledge of his dangerous character, and such servant, while in the course of his employment and in furtherance of the master's business, commits an assault on another servant, who is also employed in the master's business and is acting in furtherance of the master's business, the master is liable for the injuries resulting from the wrongful assault.

2. MASTER AND SERVANT. *Railroad engineer's assault on conductor held actionable.*

Where a conductor of a switching crew, including an engineer, was engaged in moving an engine and passenger cars from one point in the yard to another point therein, and where to complete the movement it is necessary to pass through a switch, and where the engine was halted because the switch was not thrown, and the engineer because of such fact assaults the conductor because the switch is not thrown, so that the engine may proceed to its destination, and where it was the conductor's duty to have the switch thrown, the engineer and the conductor are acting in the course of their employment, about the master's business, and the master is liable for a wrongful assault by the engineer on the conductor.

3. COMMERCE. *Rule for determining applicability of federal Employers' Liability Act stated; federal Employers' Liability Act held inapplicable to action for assault upon railroad employee by engineer.*

When applicability of the federal Employers' Liability Act (U. S. Comp. St., sections 8657-8665) is involved, or it is to be determined in a suit whether it is applicable or not, it may generally be determined by inquiring whether at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as, practically, to be a part of it. The facts in this case do not bring it within this rule as the cars being switched neither carried interstate commerce nor were

they to be used immediately in interstate commerce, nor had they been used immediately before in such commerce, but were only used therein whenever the exigencies of the railroad called them into service for that purpose.

4. MASTER AND SERVANT. *Risk of railroad's negligence not assumed.* Under the laws of this state the servant does not assume the risk, in cases against railroad companies, where the master is negligent.
5. DEATH. *Verdict in excess of present cash value of expectancy under federal act reduced.*

Where in a suit against a railroad company for an injury to a servant no case for punitive damages is made, and where the court instructs the jury that the rules applicable to the federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665) governs the amount of damages, and where the verdict is in excess of the amount of the present cash value of that part of the expectancy which they could recover under such rule, but in fact the liability is governed by state law, the verdict will not be permitted to stand, unless a remittitur is entered, reducing the amount to such sum as could stand under such rule of liability.

APPEAL from circuit court of Forrest county.

HON. R. S. HALL, Judge.

Action by Mrs. Maud E. Green, as administratrix, against Walker D. Hines, agent. Judgment for plaintiff, and defendant appeals. Affirmed, with *remittitur*.

*Tally & Mayson and T. J. Wills*, for appellant.

The declaration in this cause states that the deceased, Jesse Green, was the engine foreman, charged by the master with the duty of controlling and directing the movement of the trains and the labor of the other employees, and to order, command and direct the workmen, that is, the engineer, fireman and switchmen on such trains. It further charged that the engineer, Zack McLendon, was a quarrelsome, vicious and dangerous man with whom the said Jesse Green, as his superior in command, was placed to work. That the cause of action accrued by reason of

the said Jesse Green being placed in control of the crew in which the engineer, Zack McLendon, was in charge of the engine and by reason of his quarrelsome and dangerous character, while engaged about their work, he, the said McLendon, shot and killed Green to the damage of the plaintiff.

A special plea in bar to the action was filed setting up that at the time of the injury and death of the said Jesse Green inflicted at the hands of Zack McLendon, that the said Jesse Green and Zack McLendon were engaged in interstate commerce, and that the defendant, the common master, at the same time was so engaged in interstate commerce with the said two employees above named. To this plea a demurrer was interposed. The demurrer admits that at the time of the death of the said Jesse Green that he and McLendon together with the common master, the defendant herein, were engaged in interstate commerce.

It is a well settled principle of law that a demurrer interposed will search the whole record and attach to and overthrow the first pleadings in point of time of filing, found to be defective.

(A) Stevens on Pleadings, page 144, states the rule to be:

"That on demurrer, the court will consider the whole record, and give judgment for the party who, on the whole appears to be entitled to it. Thus, on demurrer to the replication if the court think the replication bad, but perceive a substantial fault in the plea, they will give judgment, not for the defendant, but the plaintiff, provided the declaration be good; but if the declaration be also bad in substance, then upon the same principle, judgment would be given for the defendant."

(B) In Vol. 6, Enc. Pleadings and Practice, page 326, the rule is thus stated: "The principle that, upon demurrer, the court will consider only the fact of the pleadings against which the demurrer is directed applies only to the consideration of the sufficiency of the pleading demurred

to. While, therefore, the court is restricted to the particular pleadings for this purpose, the demurrer searches the whole record, and is taken as a demurrer to that pleading which contains the first fatal defect."

(C) In the case of *McGarock v. Whitfield*, 45 Miss. 452, Justice SIMRALL said: "It is a familiar rule in pleading that a demurrer brings into review the whole record, and should be applied to the first material defect in the pleadings."

(D) At whatever state of the pleadings a demurrer is interposed it reaches back in its effects through the whole record, and attaches ultimately to the first substantial defect in the pleading on whichever side it may have occurred. *Miles v. Myers*, Walker, 379; *Wren v. Spann*, 1 Howard, 115; *Tucker v. Hart*, 20 Miss. 458. See to the same effect, *Haynes v. Covington*, 9 Smedes & Marshall, 470; *Shoults v. Kemp*, 57 Miss. 218; *Prairie Lodge v. Smith*, 58 Miss. 301; *State v. Washington Steam Fire Co.*, 76 Miss. 449.

(E) It is not too late now to extend the demurrer back to the declaration if the declaration is defective in substance and fails to state a cause of action. *Y. & M. V. R. R. Co. v. Adams*, 77 Miss. 780.

We contend that casual inspection of the record will convince this court that the learned court below erred in admitting the testimony on behalf of the plaintiff over the objection of the defendant, for the reason that the said evidence was incompetent and should not have been admitted, as appears in the record herein on pages, 88, 91, 92, 93, 101, 126 to 130, 136, and 142 to 144, and that the admitting of this testimony was very prejudicial to the rights of the appellant, in the minds of the jury.

The second error assigned herein complains of the action of the court below in excluding evidence offered by the appellant and excluded by the court, as appears of record on pages 104, 177, 179, 190, and 199. This evidence was competent, was offered for the purpose of showing the situation and relation of the parties to each other and

the master, and should have been admitted. If admitted, manifestly it would have changed the result of the trial.

We most earnestly contend that the most serious error committed by the learned court below was in the action of the court in overruling appellant's motion at the close of the appellee's testimony, to exclude all the evidence offered on behalf of the appellee, plaintiff in the court below, and to peremptorily charge the jury to return a verdict for the appellant for the following reasons, to-wit:

First: The record in this case shows that McLendon was a fellow servant with the deceased Green. Green had the authority to direct the movements of the train, and to that extent directed the movements of McLendon. McLendon's employment and the scope of the duties assigned him was to run the engine as directed by Green. At the time of the difficulty, McLendon had gotten down off the engine, and thereby abandoned his post of duty and the work he was employed to do and engaged in a personal affair of his own. The record further shows that the deceased Green was not engaged in any duties that he was employed to perform. That both had abandoned their master's business and had engaged in the settlement of a personal difficulty between themselves. As neither employee was acting in the course of his employment, with the view to the master's business, the peremptory instruction should have been given. *Hinds v. Cole*, 85 So. 199; *Petroleum Iron Works v. Bailey*, No. 21384, 86 So. 644, decided at this term of court.

Neither of the employees having acted in the course of his employment toward the furtherance of his master's business, with the view to the promotion of the business of the master, the fellow servant rule applies. The master is not liable for the injury and death inflicted by one upon the other. *Petroleum Iron Works v. Bailey*, *supra*, and the cases cited therein.

Second: The uncontradicted evidence in this case shows that engineer McLendon and the deceased Green were engaged in and about the master's business prior to and up

until the time that they entered into the conflict, which resulted in Green's death, and that they were engaged in interstate commerce.

Under the Employers' Liability Act, the master is not liable for injuries wilfully inflicted by a servant upon a fellow servant. *Roebuck v. A. T. & S. F. R. R. Co.*, 99 Kan. 544, 162 Pac. 1153; *Hulley v. Moos Brougger*, 95 Atl. 1007; *L. & N. R. R. Co. v. Hudson*, 73 So. 30.

Third: Under the Federal Employers' Liability Act the employee assumes all the risk obvious to an ordinarily careful and prudent person. The uncontradicted evidence in this case shows that Green knew the habits and conduct of McLendon better than any other man. He worked with McLendon for a number of years, during which time they disagreed repeatedly.

He was then separated from McLendon by the master at his own request and given another run. After the contract had been entered into, which gave the employee the right of seniority, Green compelled appellant, over its objection and protest, to put him back on the run with McLendon after he had been separated from him eight months or more.

Green entering into the discharge of his duties with McLendon, with a full knowledge of his disposition, temperament, and character, assumed the risk of the dangers that such employment would entail. *Chesapeake & Ohio R. R. Co. v. John J. D'Alley*, 36 Sup. Ct. 564; *C. R. I. & P. R. R. Co. v. Ward*, 40 Sup. Ct. 275; See 5 Thompson, Corp., sec. 5443, p. 239.

The eleventh and twelfth assignments of error complain of the excessiveness of the judgment and the wrong measure given by the court in submitting the measure of damages to the jury. The amount of recovery in this case, if a recovery had been proper, must be based upon the proper measure by computation of the amount that the widow might reasonably be expected to receive from her husband for her support, and such sums as the children might reasonably be expected to receive from their father

for support during their minority. *McGovey's Guardian v. McGovey, Administratrix*, 173 S. W. 765; *N. C. & St. L. R. R. Co. v. Anderson*, 185 S. W. 678.

The amount shown by the mortality tables, computed on its present worth, was the maximum amount for which recovery could be had. This amount is shown to be sixteen thousand eight hundred sixty-four dollars and thirty-two cents. This is the proper measure to determine the amount of recovery in proper case for a recovery. *C. & O. R. R. Co. v. Gainey*, 36 U. S. Sup. Ct. 633; *C. & O. R. R. Co. v. Kelly*, 26 U. S. Sup. Ct. 630.

In conclusion, we most respectfully submit that on the whole record this was not a case to be submitted to the jury but one that should have been decided by the court, as the law was and is manifestly with the appellant and the court should have given the peremptory instruction requested, directing the jury to return a verdict for the defendant. For the reason assigned, the court should reverse the case and give judgment for appellant.

*J. W. Cassedy and Currie & Currie*, for appellee.

Green and McLendon, his slayer, were members of switching crew and not engaged in interstate commerce when Green was killed and therefore the rights of parties are governed by state law. Vol. 2, Roberts, Federal Liability of Comp., Section 503, accurately states the rule to be;

The ordinary and usual test in determining whether switching crews employed in railroad yards are engaged in interstate commerce is whether at the very moment of the accident they are assisting in moving interstate traffic, that is, cars either loaded or empty, originating in one state and destined to a place in another state, territory or foreign country. *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319; *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352, 60 L. Ed. 324; *Penn. Ry. Co. v. Donat*, 239 U. S. 50, 60 L. Ed. 139; *I. C. R. R. Co. v. Benhoms*, 233 U.

S. 473, 58 L. Ed. 1051; *Clarke v. Erie R. R.*, 230 Fed. 479; *A. G. S. R. R. Co. v. Skotzy*, 71 So. 335.

We quote the authorities for the purpose of showing that the rights of appellant and appellee are not governed or controlled by the Federal Employers' Liability Act, and the amendment thereto.

III (2). Burden of proving interstate employment upon the defendant. 1 Roberts, *Injuries to Interstate Employees*, sec. 466, page 808; *Chicago B. & Q. R. R. v. Harrington*, 241 U. S. 177; *Dell Lack & West R. R. v. Yurkonis*, 238 U. S. 439; *Shanks v. Del. Lack. & West R. R.*, 239 U. S. 556; *Minneapolis & St. Paul R. R. Co. v. Winters*, 242 U. S. 353. Fellow Servant rule abolished under Federal Employer's Liability Act.

Prior to the enactment by Congress of the Federal Employer's Liability Act the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. So, if we are mistaken as to which of the laws, state or federal, should control in the final determination of this case, we respectfully submit the difference in permitting recovery is of minor importance, and under the state or federal law this case should be affirmed on the law and the facts disclosed in the record.

Section 1 of the federal employer's Liability Act provides that a recovery for the death may be had if such death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier. This section therefore abolishes the fellow servant rule. 1 Roberts, *Federal Liabilities of Carriers*, section 428, page 736.

V. Fellow Servant Rule abolished in this state. Section 4056, Code of 1906, section 6684, Hemingway's Code.

VI. Contributory negligence no bar to action. Laws of 1910, chapter 135, in effect April 16, 1910, section 502, Hemingway's Code.

VII. Assumption of risk. Where master is negligent. Abolished. Laws of 1914, chapter 156, in effect January 28, 1914, section 504, Hemingway's Code, is as follows: "In all actions for personal injury to an employee, and in all actions where such injury results in death, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death results in whole or in part from the negligence of the master.

IX. Very slight difference in right to recover under the state or the federal law. We submit, that under the facts of this case the rights of the litigants are governed and controlled by the law of the state rather than the law of the Nation. However, the only difference in the two is that under the law of the state the assumption of risk is abolished where the master is negligent, and under the law of the Nation the assumption of risk is not abolished where the servant has actual constructive knowledge of the master's negligence and appreciates the dangers necessarily incident thereto and voluntarily enters or continues in the employment of the master. *Y. & M. V. R. R. v. Dees*, 121 Miss. 439, 83 So. 613; *Railroad Company v. Horton*, 233 U. S. 492; *Railroad Co. v. Hall*, 232 U. S. 94; *McGovern v. Ry. Company*, 235 U. S. 389.

X. Appellant negligent in two respects. We submit, that the facts show and the jury found, the appellant was negligent in two respects: (A) In the employing and retaining the said McLendon in its service when it knew or should have known that he was a notoriously vicious, dangerous and unfit servant to place to work with other servants and employees.

(B) The said McLendon, for whose acts the appellant is liable, negligently and unlawfully assaulted and killed the decedent, while he and McLendon were acting within the view of furthering their master's business in moving and handling said engine and cars and the switch in question.

125 Miss.]

Brief for Appellant.

XII. Appellant's rule that certain employees should be removed. It violated this rule. Appellant recognized that it was its duty to select employees possessing mental, moral, and physical qualifications and to see that no man of bad character, vicious or reckless habits and disposition, should be retained or kept in its employment. It had the following rule: "Employees who are dishonest, immoral, quarrelsome, or otherwise vicious will not be retained in the service."

This rule was breached by appellant in retaining McLendon and placing him to work with the decedent and others. It is argued that decedent selected his position with appellant. This is a mistake. He was doing what he had a right to do under his contract and under the rules and regulations of appellant. He had a right to assume that suitable and competent fellow employees would be placed with him to perform his work. This was not done. This was negligence, a result of which was that decedent lost his life.

This court in the recent case of *Walker D. Hines Director General v. Cole*, 85 So. 199, held: "The rule at common law is that a master is not responsible to a servant for an injury sustained by him because of the negligence of another servant while both are engaged in the same service, with this exception, that a master who negligently or knowingly employs or retains in his service an incompetent servant is liable for injuries to a fellow servant, through the incompetency of the servant so employed and retained, unless the injured servant has assumed the risks incident to such incompetency." *Railroad Company v. Ward*, 173 Pac. 212; *Dickinson v. Granberry*, 174 Pac. 776; *Railroad Company v. Davern*, 177 Pac. 909; *Gila R. Co. v. Hall*, 232 U. S. 94, 58 L. Ed. 521. It will be observed that the assumption of risk was fully covered by the instructions in this case as applicable to the facts.

The court will remember that the fellow-servant rule does not apply in this case. These employees were admittedly engaged in the operation of a train. The fellow-

servant rule is abolished as to them, and the master is responsible for any injury wrongfully inflicted by one servant on another when acting within the course of his employment with a view of the master's business, although the master was not negligent in employing such servant or retaining him in his service. *Cole case, supra*.

Counsel cite the *Cole case* in support of their contention. We submit, this case establishes appellee's right to recover. The appellee did not assume the risk of being negligently and wilfully assaulted by McLendon while acting in and about the master's business, and in the furtherance thereof, in operating said train.

Could it be seriously contended that if the engineer of this train had wilfully, and with gross negligence, run the engine over the decedent and killed him because he had not opened the switch, that the appellant would not have been liable. This court has held that even in the case of a trespasser or a licensee, that an employee can not wilfully, wantonly or negligently kill or injure a trespasser or licensee. *Barmore v. V. S. & P. Ry. Co.*, 85 Miss. 440; *Barmore v. V. S. & P. Ry. Co.*, *supra*; 1 Shear & Red., Negligence, sec. 146. And the master cannot escape liability, even though the acts of the servants were unauthorized, wilful, and wrongful. *Id.* sec. 150; Thompson, Negligence, secs. 518, 519.

The court in *Banc in Indianola Cotton Oil Company v. Crowley*, 121 Miss. 263, held: "Where the general manager of a plant told a bookkeeper to leave the books and accounts with him for inspection and when the bookkeeper hesitated to do so, assaulted him, in such case the general manager was acting within the scope of his employment and about his master's business and the master was liable for his acts, though he desired to inspect his individual account with the master.

The court in this case reaffirms its announcement in the *Barmore case, supra*. *Yazoo & Mississippi Valley R. Co. v. Hare*, 104 Miss. 564; *Richberger v. Express Co.*, 73 Miss. 171; *Whitaker v. R. R.*, 160 S. W. 1009; 2 Me-

chem on Agency (2 Ed.), sec. 1929; section 1957, of Mechem on Agency; *M. K. & T. Ry. Co. v. Day*, 136 S. W. 435; *Booth v. White Engineering Co.*, 86 S. E. 32; *L. & N. R. R. Co. v. Hudson*, 73 S. E. 30.

XIII. McLendon was a reckless, grossly negligent and incompetent servant, and the court properly permitted evidence to explain his reputation. *Vicksburg & Jackson R. R. Co. v. Patton*, 31 Miss. 194; *Magourik v. Telegraph Co.*, 79 Miss. 636; *Railroad Co. v. Hicks*, 91 Miss. 354; *Railroad Company v. Hare*, 61 So. 648; *Barmore v. Railroad Co.*, 85 Miss. 440; *Hines v. Cole*, 85 So. 199; *Petroleum Iron Works v. Bailey*, 86 So. 644.

XIV. Appellee Liable Under Federal Law. In *Erie R. R. Co. v. Purcker*, 244 U. S. 320, the United States supreme court held: "Under the Federal Employers' Liability Act, an employee does not assume a risk attributable to the negligence of his co-employees until he is aware of it, unless the risk is so obvious that an ordinarily prudent person in his situation would observe and appreciate it. *Chicago, Rock Island & Pacific R. R. Co. v. Ward*, 252 U. S. 18.

The question of assumption of risk, even under the Federal Act, was one for the jury. *Yazoo & Mississippi Valley R. R. Co. v. Dees*, 121 Miss. 464; *Railroad Co. v. Horton*, 233 U. S. 492. As the federal act does not apply, however, there is no question of the assumption of risk under our state statute, the jury having found on the facts that defendant and its servant were negligent.

The *Roebuck case*, 162 Pac. 1153, from the Kansas supreme court, is relied on by counsel. This case is not applicable to the case at bar. The *Roebuck case* was brought under the Federal Employer's Liability Act and the assault was not committed, within the scope of Mexican employment. It was not committed while he and his fellow employee were in the prosecution of the master's business in furtherance of their employment.

The decedent in the case at bar was negligently and willfully assaulted in furtherance of his master's business.

Not so in the Roebuck case. The *Hulley Case*, 95 Atl. 1007, was governed and controlled by the Workmen's Compensation Act of New Jersey and is not applicable to the case at bar.

XVI. Verdict Not Excessive. The verdict is large but the loss is great. The loss of their young husband and father with his splendid earning capacity and support, justifies a large verdict. Verdicts for much larger sums have been permitted to stand for death claims. In *Brickman v. Southern Ry. Co.*, 54 S. E. 553, the supreme court of South Carolina allowed a verdict for forty-four thousand dollars for the loss of two legs. In *Beard v. A. & V. Ry. Co.*, —So. Rep. —, this court permitted a verdict to stand for twenty-five thousand dollars for the loss of one hand. Other large verdicts, where the injuries and losses were great have been permitted to stand. We therefore earnestly insist that this award is not too large and should be permitted to stand.

XVII. We therefore respectfully submit: 1. That the state law rather than the Federal Act controls the law and the facts of this case, as the employees were engaged in intrastate commerce at the time when and the place where decedent was killed.

2. That appellant was guilty of negligence in violating its rules and retaining said McLendon in its service in violation of said rules, when it knew that he was a desperate character and a grossly negligent and reckless man and unfit to associate with diligent, careful and faithful employees.

3. That as a result of retaining McLendon in its service the decedent was negligently and wantonly killed to the great loss and detriment to his wife and children.

4. That appellant was negligent in furnishing decedent with unfit fellow servant and under the law of this state the decedent did not assume the risk of the negligent and wanton acts of McLendon at whose hands the decedent met his death.

5. That the Federal Employers' Liability Act does not apply in this case and if so under this act it was a question of facts as to whether the decedent assumed the risk of the acts of McLendon from which the decedent died, and as this question of fact was decided in appellee's favor this question is foreclosed under the decisions of this court and the supreme court of the United States.

6. That appellant received more at the hands of the court below than it was entitled to receive in the instructions given and therefore it cannot now justly or legitimately complain.

We, therefore, earnestly and respectfully submit, that this case should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

Mrs. Maud E. Green, the appellee, brought suit against the appellant in the circuit court for the death of her husband, an employee of the appellant, his death being brought about by an engineer in the service of the appellant killing the appellee's husband at a time when the engineer and the deceased were employed by the appellant and engaged in moving some passenger cars from one point in the yards in Hattiesburg to another point in the yards. The original declaration was filed in three counts, alleging that the engineer was an unsafe and dangerous man to be employed and with whom to work, on account of his quarrelsome, dangerous, and vicious habits and character, which were known to, or by the exercise of reasonable diligence ought to have been known to, the appellant.

The appellant defended under the general issue, and filed certain special pleas. Among other pleas, it pleaded that the deceased and the engineer were at the time of the killing engaged in interstate commerce for the appellant, and that the liability of the appellant was covered by the federal Employers' Liability Act (U. S. Comp. St., sections 8657-8665), and that under this act there was no liability upon the appellant for the death of the appellee's

intestate. When this plea was filed by the defendant a new suit was filed by the appellee as administratrix under the federal Employers' Liability Act, in which the acts alleged in the other suit were declared on, and it was alleged that at the time of the injury the deceased and the engineer were engaged in the business of the master and in furtherance of the master's business, bringing the case under the federal Employers' Liability Act, and then, upon motion of the appellee, the two suits were consolidated by the circuit court without objection, and the case proceeded to judgment, resulting in a verdict and judgment of thirty-five thousand dollars in favor of the appellee as administratrix.

On the trial it appeared that the deceased was a conductor of a switching crew operating in the yards at Hattiesburg, Miss., and that the engineer was the engineer in charge of the cars being moved from one point in the yard to another point. While the movement was being made the switchman who accompanied the crew gave the engineer a signal, which he repeated several times, and the engineer had told the switchman not to signal him but once, that he was on the watch, and would see the signal, and when the switchman signaled more than once on this occasion and remounted the running board on the engine the engineer came down with a hammer and accosted the switchman about disobeying his admonition or instruction about the signal. The switchman, who was a negro, told the engineer that he was doing his duty as best he could under the instructions of Mr. Green, the deceased, who was the foreman of the crew. Whereupon the engineer told the switchman that he would kill him and Mr. Green too, and knocked the switchman off the running board with the hammer. This resulted in certain of the crew being taken from the train to carry the switchman to the hospital. The engineer moved on to the switch, which lay along his route, and when he reached the switch it had not been thrown so as to permit him to proceed, and he stopped the engine, and Mr. Green, the conductor, and fore-

man proceeded from the cars being moved to the switch to throw the switch, it being his duty to do so in case the switchman was not available for that service. While he proceeded from the cars to the switch McLendon, the engineer, came down from the engine with a pistol and took his stand near the front of the engine, and, as Green, the conductor, and foreman, came up, accosted him with the remark, "Why in the hell have you not thrown the switch?" The only person who was produced at the trial who heard this remark was engaged in working on some cars near the point and passed around the car in his work, and a few moments heard a pistol shot. There were two or three shots fired, and when the first shot was fired other persons saw McLendon, the engineer, but did not see the deceased. McLendon refused to let any one approach the body of the deceased until he had taken an iron pin and placed it near the man and had sent for a policeman to come to the scene.

It was in proof that some years before the killing in question the deceased and McLendon had worked together, and that they did not get along, having personal difficulties about the work. The railroad company on the application of the deceased, Green, had changed him from a day crew to a night crew, and they worked separately until some eight or nine months before the killing. Prior to the killing some eight or nine months there had been a strike and in the settlement of the strike between the employees and the railroad company and separate contracts had been entered into under which the railroad company had agreed that the different brotherhoods under which its employees were organized, McLendon being a member of the Brotherhood of Engineers, and the deceased, Green, being a member of the conductor's organization, which contracts gave the employees the right to select positions in the service according to the rule of seniority; that is to say, the man who had been longest in service of the railroad company had the first right to select his service, and those who had been in the service a less time having

to select from the positions available after their seniors had selected employment. After this contract was executed, Green, the deceased, applied to the railroad company for work during daylight, that being more desirable than the night work. At first the railroad company had declined or failed to give him the promotion, but was approached by the manager of the conductor's organization, and told that Green had a right under his contract to select the position. The railroad company told Green that if he would arrange with the man in charge theretofore of the daylight work to change positions it would be all right, and the change was accordingly made. When the change was made it threw Green into the crew in which McLendon, the engineer, was working in the switching operations in the yard. The railroad company set forth by plea that Green had assumed the risk of working with McLendon by virtue of his claiming his rights under the contract, and that his administratrix could not recover because of that fact under the federal Employers' Liability Act. The pleadings made an issue on this proposition, and the case was submitted to the jury on instructions as to the rights of the parties bearing on the assumption of the risk, in effect telling the jury that if Green knew of McLendon's character and placed himself in association with McLendon with knowledge thereof under his contract with the railroad company, he had assumed the risk incident to working with such a dangerous man, and submitting the counter proposition that if he did not know that McLendon was a dangerous man with whom to work he would not assume the risk.

It appears from the evidence for the plaintiff that McLendon was a contentious, disagreeable, and quarrelsome man; that he was constantly embroiled with his fellow employees in quarrels about the work; that he would not obey the signals, and that he was a stickler for the rules; that he frequently had quarrels, and had habitually carried a pistol, either on the engine seat or upon his person; and that he had been frequently reported to the rail-

road company. It also appeared in evidence that Green had reported him for violating his duties on a number of occasions. It was also in testimony for the plaintiff that he, the engineer, had several times tried to catch Green between the cars and then move his engine so as to injure him. It was also in proof that he had killed a man prior to the killing of Green about some matter disconnected with the railroad business, and that the employees of the yard regarded him as a turbulent, dangerous, and violent man, and also that he had the general reputation in the community of being a dangerous, quarrelsome, and violent man.

The first question, and the most important question to be decided in this suit, is whether or not the killing grew out of the master's business while the two men were employed about the master's business and in furtherance of the master's business, and whether the master is liable for the death of one of its employees at the hands of another employee when not caused by the movement of the cars or physical appliances of the master, but caused by a weapon as in the present case.

The appellant relies principally upon the case of *Hines, Director General, v. Cole*, 85 So. 199, in which case this court held that the employees in that case were not in furtherance of the master's business, and that the quarrel in that case was the private quarrel of the parties involved in that difficulty. The character of the employee for peace and violence was bad, as here. The rule as stated in the syllabus is as follows:

"The master is not liable for the wrongful assault by one servant on another, unless the servant in making the assault was acting within the course of his employment, with a view to his master's business."

The converse of the rule is true, that if the assault is made while acting within the course of his employment and with a view to his master's business, the master is liable, especially where he has knowledge that the servant has such a character for violence or has such a vicious dis-

position as to make the assault probable. Under the Cole Case it is held that when the fellow-servant rule does not apply the master is responsible for an injury wrongfully inflicted by one servant on another acting within the course of his employment with a view to his master's business, although the master was not negligent in employing such servant, or in retaining him in his service.

In the present case there is ample proof that the master had knowledge of the vicious disposition and violent character of the engineer who committed the assault in this case as to make him liable regardless of the rule above stated, provided, of course, that the servant was acting within the scope of his employment and with a view to his master's business. We think the rule in this state and the rule in the federal court is the same as to this proposition, and it would be immaterial which law governed so far as this feature of the case is concerned, provided the engineer was acting within the scope of his employment and with a view to his master's business. Do the facts of this case show that the engineer and the deceased were so acting in the course of their respective employments, and with a view to the furtherance of the master's business? They were engaged in moving the master's cars and machinery from one point of the yard to another point of the yard. In order to carry the car to its destination it was necessary to pass through the switch about which the difficulty arose, and it was the fact that the switch had not been thrown and the track cleared so that the engineer could proceed to his destination that he accosted, assaulted, and killed the deceased. It was no private quarrel, but was a quarrel about the master's business, and it was because the engineer was delayed and hindered in proceeding to his destination that he was irritated, caused him to quarrel, make the assault, and kill the deceased. It was the deceased's business to throw the switch under the circumstances that confronted the crew at the particular time, and it was his business, and he had authority to control the movement of the trains, but it was the engineer's duty

to move the train, and we think it was within the scope of his power and duty to call for an explanation, where one was reasonably required as to why the switch was not thrown or as to why the track was not cleared so he could proceed to his destination. So far as the question as to whether the two men were engaged in the master's business, about the master's business, and whether the quarrel occurred and the killing resulted from this relation, the evidence amply sustains the plaintiff's contentions as to liability on this feature of the case.

Up to this point the state and federal laws, we think, are in harmony, but questions now arise in which the rule in the two jurisdictions differs. Under the federal Employers' Liability Act the doctrine of the assumption of the risk applies where the servant injured knew and appreciated the risk and voluntarily continued in the employment after such knowledge without promise on the part of the master to remedy the condition; while under the state law, if the master is negligent, the servant does not assume the risk. There is also a difference in the elements for which damages may be allowed in the two jurisdictions. Under the state law the plaintiff will be entitled to recover the net present cash value of the expectancy, and also would be allowed to recover for damages from the loss of association, counsel, consortium, etc. While under the federal Employers' Liability Act the plaintiff would be limited to the monetary value, or the present value of the amount of money, they would have received for support, gifts, etc., had the deceased lived, and would not be entitled to recover for such parts of the value of the expectancy as the deceased himself would have earned, but would not have turned over to the family, and they would not be entitled to damages for loss of society, counsel, or consortium.

The defendant by proper pleadings and by proof tending to sustain its pleadings raised the issue of the assumption of risk in working with the engineer, and the trial court peremptorily instructed the jury for the defendant

that the federal Employers' Liability Act controlled the case, and the elements of damage involved under that law was all that was submitted to the jury for consideration, and the verdict exceeds the amount of the present value of the expectancy of the deceased. The plaintiff contended in the court below that the liability was given by the state law, and contends in this court that this is true.

In view of the difference in the rule under the state law and the rule under the federal law, it is important to determine which law governs the transaction. The switching movement in the yard which was being done at the time of the killing was a movement of certain passenger cars and a coal loader and a gong. The coal loader was being carried to the shops for repair, and was not in use by the railroad company immediately preceding the movement, nor was it placed back in the service of loading cars for several days thereafter. The passenger cars had not been used in service on the day of the injury in any movement or in any operation for the railroad company, nor were they being carried to be cleaned for immediate use, but were in fact placed in the service of the railroad company the day following the injury. These passenger coaches were used both for intrastate commerce and for interstate commerce as the needs of the railroad company called them into service. The injury occurred in the forenoon, and there was no purpose to use these cars during the day of the injury, nor was there any fixed or settled purpose to use them in such service at any particular time. Their use, or whether they would be used or not, depended entirely upon the circumstances which might arise, and were not controlled by any circumstances then existing, nor was there any settled purpose to use them at any particular time. They were merely used when the needs of the railroad company required their use.

The United States supreme court has laid down the test for determining whether the federal Employers' Liability Act was applicable in the following language:

"Generally, when applicability of the federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it." *Southern Pac. Co. v. Industrial Accident Commission*, 251 U. S. 259, 263, 40 Sup. Ct. 130, 131 (64 L. Ed. 258); *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 151, 33 Sup. Ct. 648, 57 L. Ed. 1125, 1127, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, 438, L. R. A. 1916C, 797; *New York C. R. Co. v. Porter*, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536; *Kinzell v. Chicago, M. & St. P. R. Co.*, 250 U. S. 130, 133, 39 Sup. Ct. 412, 63 L. Ed. 893, 896.

Measured by this test, the facts do not bring the case within the federal Employers' Liability Act, for the reason that none of the things being operated and moved at the time of the injury were being then used in interstate commerce, nor were they intended to be so used immediately upon being placed in condition for use, nor was there any fixed time or purpose for their early use so as to make them so intimately connected with interstate commerce as to be practically a part thereof.

There are a number of assignments of error as to instructions complained of by the appellant, but the errors, if any, are favorable to the appellant, and require more facts to be found to render liability against the appellant than the law required.

There is one assignment of error, however, that is serious, and that is that the verdict is excessive. The trial proceeded, as above stated, on the theory that the plaintiff was limited to elements of damage recognized by the federal Employers' Liability Act, and as the jury only had these elements submitted for its consideration, the verdict is excessive, and it cannot be upheld upon any theory that the jury might have found elements of damage, if properly

instructed, which might be sustained under the elements recognized by the state law. There is no theory or contention in the record or in the arguments for the allowance of punitive damages. The expectancy of the deceased was twenty-nine and sixty-two hundredths years, and he was a healthy man both in mind and body, and was earning five dollars per day. This would amount to one thousand eight hundred and twenty-five dollars per year. The evidence does not contain any calculation of the expectancy, nor are any tables introduced by which computation may be made according to any standard, recognized mortality tables. But, finding the present value by dividing the total expectancy, if earned, by one plus six per cent, the legal rate of interest, for the average number of years of the expectancy, which in the absence of other proof we will apply in this case, we find that the gross net value is approximately twenty-four thousand dollars, from which must be deducted the expenses that would have been incurred by the deceased on his own account in living and supporting himself during the period of his expectancy, which would doubtless have amounted to at least fifty dollars per month, and we think that the highest verdict that could be upheld on the elements of damage involved in the trial would be sixteen thousand dollars.

If the plaintiff will remit all of the judgment in excess of sixteen thousand dollars, the judgment will be affirmed; otherwise it will be reversed and remanded because of the excessive verdict.

*Affirmed, with remittitur.*

W. H. COOK and HOLDEN, JJ., being disqualified, took no part in the decision of this case.

SHIREMAN *et al.* v. WILDBERGER *et al.*

[87-South. 657, No. 21350.]

JUDGES. *Relationship to attorney not a disqualification; suggestion of disqualification must be made before trial unless knowledge acquired subsequently.*

Under section 165 of the state Constitution of 1890, a judge is not disqualified to sit in a case pending before him merely because he is related to an attorney in the case. To constitute disqualification the attorney related to the judge must be interested in the subject-matter, or *res* of the suit. A party desiring to suggest the disqualification of a judge in a case must do so before the trial of the case, unless his knowledge of the facts of disqualification was acquired subsequent to the trial of the case.

APPEAL from chancery court of Coahoma county.

HON. G. E. WILLIAMS, Chancellor.

Motion to vacate judgment. Motion denied.

For former opinion, see 87 So. 131.

ETHRIDGE, J., delivered the opinion of the court.

This case was affirmed on a former day, and this motion is filed to vacate the judgment because it is alleged that Sam C. Cook, Jr., is a member of the firm of Cutrer, Cutrer & Cook, who represented the appellees in this court, and that the said Sam C. Cook, Jr., is a son of Judge SAM C. COOK of this court, a member of the division which rendered the judgment of affirmance; and that the firm of Cutrer, Cutrer & Cook have a contingent interest in the recovery in said suit, but that the precise interest that the said firm had in the recovery appellants are not advised, but that they are advised and so charged that the said firm of which Sam C. Cook, Jr., is a member are interested in the recovery herein and suggesting the disqualification of Judge SAM C. COOK and asking that the judgment be vacated.

The affidavit filed in support of the motion by the appellant alleges that one of the appellees, Mrs. Roseboom, is represented by Cutrer, Cutrer & Cook of Clarksdale, Miss., and that said firm is composed of J. W. Cutrer, J. C. Cutrer, and Sam C. Cook, Jr. "Affiant further states on oath, on information and belief that the said firm of Cutrer, Cutrer & Cook have a contingent interest in the recovery of the amount sued for in the above-styled cause, that is to say that if the appellees in said cause are successful in having said cause affirmed in the supreme court of the state that the said firm of Cutrer, Cutrer & Cook will obtain thereby a large sum of money as their contingent interest in the amount recovered." The affidavit nowhere states that such knowledge of interest was not known to the appellant and their attorneys prior to the submission of the case to the court, nor prior to the decision affirming the said judgment herein, nor does it state what information the allegation is based upon, nor when nor how it was obtained further than to allege that a printed civil docket of the February term of the circuit court of the Second judicial district of Coahoma county, Miss., shows that there is such a firm as Cutrer, Cutrer & Cook engaged in the practice of law and that they are listed as counsel for a number of plaintiffs and defendants.

Sam C. Cook, Jr., filed an affidavit in answer to this motion stating that he is not a member of the firm of Cutrer, Cutrer & Cook, and that he has no knowledge of any such firm, but that he is employed on a salary in the office of J. W. Cutrer, and that he is not advised as to J. W. Cutrer's interest in the subject-matter or the litigation, but that he is not interested therein, and that the recovery of the judgment would have no effect upon him one way or the other.

He further makes affidavit that before the case was called for argument that he disclosed to E. C. Brewer, one of the attorneys for the appellant and the attorney who makes the affidavit of disqualification, his connection and *status* with reference to employment with Mr. Cutrer, and

that he believes that the other counsel understood his relation and connection with Mr. Cutrer. There is no denial of these statements in a counter affidavit and there is no counter affidavit of any kind filed in the cause.

Prior to the submission of the case and for some time past, Judge Sam C. Cook informed each member of this division of the court of the nature of Sam C. Cook, Jr.'s employment by Mr. Cutrer, and his relation was known to the members of the court.

Section 165 of the state Constitution reads as follows:

"No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. Whenever any judge of the supreme court or the judge or chancellor of any district in this state shall, for any reason, be unable or disqualified to preside at any term of court, or in any case where the attorneys engaged therein shall not agree upon a member of the bar to preside in his place, the Governor may commission another, or others, of law knowledge, to preside at such term or during such disability or disqualification in the place of the judge or judges so disqualified."

Section 715, Hemingway's Code, section 995, Code of 1906, reads as follows:

"The judge of a court shall not preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, or wherein he may have been of counsel except by the consent of the judge and of the parties."

It will be seen from a reading of these sections that a judge is disqualified in a case where he is related to any of the parties interested, except with the consent of each of the parties and of the judge. We held in the case of *Norwich Fire Ins. Co. v. Standard Drug Co.*, 121 Miss. 510, 83 So. 676, that a party to the suit within the meaning of these sections is one who is directly interested in the

subject-matter in issue and the mere fact that an attorney was related to the judge did not disqualify the judge where he had no interest; that the interest of the attorney must be in the subject-matter, or *res*, of the suit.

There was no suggestion of disqualification of Judge Sam C. Cook, nor was there any motion to transfer it to the other division of this court because of the relationship between counsel and the judge. The record shows that the attorneys now making the motion knew as much about the matter prior to the argument and submission of the cause as they know now, and yet with the full facts disclosed to them they elected to proceed before this division of the court and take their chances on winning or losing their suit. It ill becomes counsel to take chances and after the judgment is rendered to then for the first time undertake to raise disqualification where they knew, if there was any disqualification at all, that it existed prior to the argument and submission of the case, such a proceeding is utterly unfair to a judge and to the opposing litigant, and where no suggestion of disqualification is made the party will not be heard after judgment to raise the question, unless he shows that at that time he had no knowledge thereof.

The motion is utterly without merit and is overruled.

*Motion overruled.*

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SOVEREIGN CAMP, W. O. W., v. MILLER.

[ 87 South. 892, No. 21672.]

1. INSURANCE. *Certificate provision that member's contract is governed by laws of society is binding if change made thereby is reasonable and before benefit becomes payable.*  
A provision in an insurance certificate that the contract is governed by the laws of the society then in force or adopted thereafter is valid and binding upon the beneficiary, provided subsequent changes of contract are reasonable and made before benefit accrues.

5 Miss.]

Brief for Appellant.

INSURANCE. *New limitation as to time for suit held void.*

Where a life insurance contract in a fraternal order is governed by the laws of the order then or afterwards adopted, the adoption in 1913 of a new constitution and code of laws by the order superseded all previous constitutions and laws, and a provision therein limiting the right to commence suit within one year from death of insured was prohibited by section 3127, Code of 1906 (Hemingway's Code, section 2491) and is void.

APPEAL from chancery court of Warren county.

HON. E. N. THOMAS, Chancellor.

Action by Mrs. Sallie Miller against the Sovereign Camp, Woodmen of the World. From decree for plaintiff, defendant appeals. Affirmed.

*Went & Landau*, for appellant.

The issue is simple. Is the complainant entitled to recover under the laws of this organization? We respectfully maintain that she ought not to be permitted to maintain this suit. It cannot be doubted that Wm. H. Landman only agreed to be bound by the constitution and laws of the order existing at the time of his admission into the order, or thereafter adopted. We set forth in our original brief, pages 3 and 4, the pledges assumed by him when he sought to become a member. In his application, dated January 23, 1897, he assumed the following unequivocal obligation:

It is agreed that all the provisions of the constitution and laws of the order, now existing, or hereafter adopted, shall form a part of the certificate issued hereunder, whether printed in, or referred to, in each certificate or application, and the certificate was issued to him, dated February 1897, upon the faith of this pledge and obligation. He remained a member of the order until the day of his death, on the 25th day of September, 1914; was protected by its laws during his long period of membership, and there is no evidence to indicate that he ever protested against the changes in the constitution and laws, or that these

changes did not meet his approval; and by the very terms of his application, and his certificate, he was bound by every amendment to the constitution and Laws adopted by the order. It appears that he was treated and recognized as a loyal member of the organization; that he was satisfied with all of its amendments, and we submit, it was not permissible even for his wife, his original beneficiary in the certificate, to criticise or ignore these amendments, and we further contend that this complainant cannot condemn these laws, or demand that they be treated as invalid. This court has, as stated in our original brief, held valid amendments to the constitution and laws. *Newman v. Supreme Lodge, Knights of Pythias*, 110 Miss. 371; *Butler v. Eminent Household of Columbia Woodmen*, 116 Miss. 85; 29 Cyc., 124; *Ogden v. Sovereign Camp, Woodmen of the World*. (April, 1907, Supreme Court of Nebraska), 111 N. W. 797; Hardy's Fraternal Society Law, Revised 1910, page 343. Therefore, not only was W. M. Land governed by the constitution and laws of the society, but also any beneficiary he might designate in his certificate.

"The supreme court of Nebraska has even held, where members have agreed in their application to be governed by all by-laws and rules now in force or hereafter adopted, they will be bound by all subsequently enacted by-laws the same as by those in force at the time the certificate was issued." *Farmers Mutual Insurance Company v. Kinney* (May, 1902), 64 Neb. 808; Hardy's Fraternal Society Law, Revised, 1910, page 348; *Lange v. Royal Highlanders* (December, 1905), Supreme Court of Nebraska, 106 N. W. 224; *Sheppard v. Bankers Union* (June, 1906), Supreme Court of Nebraska, 108 N. W. 188; *Farmers Mutual Insurance Co. v. Kinney* (May, 1902), 64 Nebraska, 808; *Funk et al. v. Stevens et al.*, 169 N. W. 6; *Palmer v. Loyal Mystic Legion of America* (Supreme Court of Nebraska, April 23, 1910), 126 N. W. 285; 7 Corpus Juris, pages 1078, 1079; *Ibid*, 1079.

I. Contractual Limitations Upheld by a Large Majority of the State Courts and by the Supreme Court of the United States. Appellee, in her brief, contends that: The contract used on was made in Mississippi, is a Mississippi contract, and is to be governed by the laws of Mississippi, but, as appellee refers to the case of *Miller v. Insurance Company*, 74 N. W. 416, decided by the supreme court of Nebraska, we respectfully direct the court's attention to the following Nebraska cases: *Fireman's Fund Ins. Co. of California v. Buckstaff* (Supreme Court of Nebraska, Oct. 24, 1893), 56 N. W. 697; *Insurance Co. v. Fairbanks*, 49 N. W. 711, 32 Neb. 750; *Insurance Co. v. Buckstaff*, 56 N. W. 697, 38 Neb. 150; *German Ins. Co. v. Davis* (Supreme Court of Nebraska, June 5, 1894), 59 N. W. 698.

Contractual Limitations have been upheld by the following courts: Arizona: *Gill v. Manhattan Life Ins. Co.*, 95 Pac. 89. Arkansas: *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. 196; *McCulloch v. Mutual*, 78 Ark. 32. Connecticut: *Chichester v. N. H. Fire Co.*, 74 Conn. 510, 5 Atl. 545. Georgia: *Met. Life Ins. Co. v. Caludle*, 122 Ga. 608, 50 S. F. 337; *Brooks v. Georgia Home Ins. Co.*, 99 Ga. 116, 24 S. E. 869; *Ins. Co. v. Amos*, 98 Ga. 533, 25 S. E. 575; *Greenwich Ins. Co. v. Williams*, 98 Ga. 532, 25 S. E. 31; *Maril v. Homes Ins. Co. & C.*, 25 S. E. 189; *Hartford Fire Ins. Co. v. Amos*, 98 Ga. 533, 24 S. E. 575. Illinois: *Richter v. Ins. Co.*, 66 Ill. App. 606; *Stephens v. Phoenix Assur. Co.*, 85 Ill. App. 355; *Merchants Life Assn. v. Treat*, 98 Ill. App. 59. Iowa: *Matt v. Iowa Mut. Aid Assn.*, 46 N. W. 857, 81 Ia. 135; *Harrison v. Ins. Co.*, 102 Iowa, 112, 71 N. W. 220; *Whilhelm v. Ins. Co.*, 103 Iowa, 72 N. W. 685; *Garretson v. Ins. Co. of Iowa*, 86 N. W. 32. Kansas: *State Ins. Co. v. Stoffels*, 48 Kans. 205, 29 Pac. 479; *Modern W. of A. v. Bauersfield*, 62 Kan. 340; Kentucky: *Smith v. British Amer. Ins. Co.*, 110 Ky. 56, 60 S. W. 841; *Lee v. Union Cent. Life Ins. Co. (Ky.)*, 56 S. W. 168. Maryland: *Earnshaw v. Sun Mutual Aid Society*, 68 Md. 465; *Metropolitan Life Ins. Co. v. Dempsey*, 72 Md. 288; *Home Friendly Society v. Robeson*, 100

Md. 86; *Arnold v. Supreme Conclave I. O. H.*, Decided June 26, 1914, Md. 680, 91 Atl. 829. Massachusetts: *Lewis v. Met. Life Ins. Co.*, 180 Mass. 317, 62 N. E. 369; *Paul v. Fidelity & Casualty Ins. Co.*, 71 N. E. 801, 186 Mass. 413. Michigan: *Barry & Finan Lumber Co. v. Citizen's Ins. Co.*, 136 Mich. 42, 98 N. W. 761; *Lau v. New Eng Mut. Acc. Ass'n*, 94 Mich. 266, 53 N. W. 1104. Mississippi: *Ohio v. Western Assur. Assn.*, 5 So. 102. Nebraska: *German Ins. Co. of Freeport v. Davis*, 40 Neb. 700, 59 N. W. 698; *Firemen's Fund Ins. Co. v. Buckstaff*, 38 Neb. 150, 56 N. W. 697. New York: *Williams v. Fire Assn. of Phila.*, 104 N. Y. Supp. 100; *Sweetser v. Met. Life*, 28 N. Y. Supp. 543; *Allen v. Dutchess Co. Mutual Ins. Co.*, 88 N. Y. Supp. 530; *McCloskey v. Sup. Council*, 109 N. Y. App. Div. 309; *People v. American Steam Boiler Co.*, 41 N. Y. Supp. 631, 10 App. Div. 9. North Carolina: *Love v. Assn.*, 115 N. C. 18, 20 S. E. 169. Ohio: *Prudential Ins. Co. v. Hawle*, 19 Ct. Rep. 621; *Apple v. Cooper Ins. Co.*, 80 N. E. 955, 76 Ohio, 52. Oregon: *Eagan v. Ins. Co.*, 29 Ore. 403, 42 Pac. 99. Pennsylvania: *Mooney v. Supreme Council R. A.*, 90 Atl. (P. A.) 132. Rhode Island: *Wilkinson v. Ins. Co.*, 27 R. I. 146, 61 Atl. 43. Texas: *Suggs v. Ins. Co.*, 9 S. W. 676, 71 Tex. 579; *International Travelers Assn. v. Bosworth*, 156 S. W. (Tex.) 346. Vermont: *John Morrell & Co. v. New England Fire Ins. Co.*, 71 Vt. 281, 44 Atl. 358. Virginia: *Ins. Co. v. Aiken*, 82 Va. 424. Washington: *Meesman v. Ins. Co.*, 27 Pac. 77. Wisconsin: *Griem v. Casualty Co.*, 75 N. W. 67, 99 Wis. 530. Federal: *Stefel v. Ins. Co.*, 51 Fed. 715. United States Supreme Court: *Riddlesbarger v. Insurance Co.*, 7 Wallace, 389. Canada: *Allen v. Merchants Marine Ins. Co.*, 9 Can. L. T. 13; *Robertson v. Pugh*, 9 Can. L. T. 17. See, also, the following cases cited in Rose's Notes on United States reports, revised Edition, Vol. 6, pages 634 et seq.: Colorado: *Daly v. Concordia Fire Ins. Co.*, 16 Colo. App. 350, 65 Pac. 416; *Atchison, etc., R. R. Co. v. Baldwin*, 53 Col. 422. California: *Tebbetts v. Fidelity & Casualty Co.*, 155 Cal. 138, 99 Pac. 502; Indiana: *Knights & Jillson Co. v. Castle*, 172

Ind. 112, 87 N. E. 981; *Caywood v. Supreme Lodge of Knights, etc., of Honor*, 171 Ind. 412, 86 N. E. 483. Missouri: *Sims v. Missouri Pac. R. R. Co.*, 177 Mo. App. 27, 163 S. W. 278; *Johnson Grain Co. v. Chicago, etc., R. Co.*, 177 Mo. App. 197, 164 S. W. 183; *Dolan v. Royal Neighbors*, 123 Mo. App. 154, 100 S. W. 500. Montana: *Parchen v. Chessman*, 49 Mont. 336, 142 Pac. 634. North Dakota: *Cook v. Northern Pac. R. R. Co.*, 32 N. D. 348, 155 N. W. 869; *Missouri, etc., Ry. Co. v. Harriman*, 227 U. S. 673; *Harvey v. Fidelity & Casualty Co.*, 200 Fed. 928; *Godard v. Casualty Co.*, 167 Fed. 752; *Lynchburg Cotton Mill Co. v. Traveler's Ins. Co.*, 149 Fed. 958; *Luckenbach v. Home Ins. Co.*, 142 Fed. 1026; *Sprigs v. Mutual, etc., Life Assn.*, 137 Fed. 170; *Union Cent. Life Ins. Co. v. Skipper*, 115 Fed. 72.

II. Contractual Limitations Upheld in Mississippi. This court, in *Ghio et al. v. Western Assur. Co.*, November 5, 1888, 5 So. 102, held: "A condition in an insurance policy that no suit against the insurer for any claim under the policy shall be sustained unless commenced within twelve months next after the loss and that the lapse of this period shall be conclusive evidence against the validity of any claim asserted in any subsequent action, is a bar to a suit commenced twelve months after the loss, it not appearing that this condition was waived by the insurer." See, also, *Ward v. Fire Insurance Company*, 82 Miss. 124, cited in our original brief, page 28; *Taylor v. Insurance Company*, 101 Miss. 480, page 23 of our original brief.

*Dabney & Dabney*, for appellee.

Even were the one year limitation as it appears in the constitution of 1913, which is the constitution last adopted before Mr. Land's death, legal and valid, ordinarily binding on appellee which we shall, we think, show it now to have been, it would not preclude appellee from bringing her suit because, as the above quoted testimony shows she never knew until three months before the trial of this case

that her cousin, the insured, was dead, that he left a policy in the appellant order, that others had tried to get the benefits and failed because disqualified, and that she was the only living legal beneficiary. She immediately notified the order of these facts and made claim for the amount. Her claim was declined and she brought this suit in less than three months after learning of her rights in the matter. The law hereon is correctly announced in 14 Ruling Case Law on Insurance, page 1420:

"Sec. 582: Circumstances excusing compliance with provision. Failure to bring suit within the time provided by the policy is not excused by the fact that the person entitled to sue is an infant, or that the person entitled to sue did not know of the limitation of time contained in the policy, but a limitation provision does not defeat the claim of the beneficiary when he does not know of the existence of the policy or of the death of the insured, until more than the time specified and he notifies the company at once after acquiring such knowledge."

And in support of this the case of *McElroy v. John Hancock Mutual Life Insurance Company*, 88 Mo. 137, 41 Atl. 112, 71 Asr. 400, is cited. *Union Casualty, etc., Co.*, 49 La. Ann. 636. See, also, *Globe Accident Co. v. Gerisch*, 163 Ill. 625, 54 Am. St. Rep. 486; *Kentzler v. American Mut. etc., Assn.*, 88 Wis. 589, 43 Am. St. Rep. 934.

So as we say, even where the one-year limitation is valid, it could not apply to a rightful beneficiary in ignorance of the fact that the insured had died, that he had a certificate in the order that she was entitled to the benefits thereunder, until after the limitation period had expired, especially as in this case, where the order was notified and claim made as soon as the appellee learned of the matter, and suit was brought promptly on refusal of the order to pay appellee the amount of the benefits.

B. Because said one-year limitation was void, because:  
1. The clause itself in the law of the order does not express a clear intention that it shall operate retrospectively.

Our court has held (*Newman v. Sup. Lodge*, 110 M. R. 371) that the contract of insurance consists of the application, certificate, and constitution and laws, construed together. Let us see what they contain. Insured did agree in his application that:

"All of the provisions of the constitution and laws of the order now existing, or hereafter adopted, shall form a part of the certificate issued hereunder, whether printed on or referred to in such certificate or not. What does the certificate say?

"This certificate is issued and accepted subject to all the conditions on the back thereof, and all the conditions named in the constitution and laws of this fraternity, and liable to forfeiture if said sovereign shall not comply with said conditions, constitution and laws, and such by-laws and rules as are or may be adopted by the sovereign camp, head camp or camp of the jurisdiction of which he is a member at the date of his decease."

And on the back of said certificate we find this: "This certificate is issued in consideration of the representations and agreements made by the person named herein in his application to become a member, etc."

It is true that the insured agreed in his application that provisions of the constitution and laws thereafter adopted, should form a part of his certificate, but this only meant such laws as the order could legally enact. It will be further observed that the certificate is issued subject to all the conditions named in the constitution and laws of this fraternity, and, clearly this means the constitution and laws in effect when the insured became a member of appellant order—that is the 1895 Constitution and laws.

Further, the certificate provides that it is liable to forfeiture if said sovereign shall not comply with what? With said conditions, constitution and laws; that is, if the insured (sovereign) fails to comply with the conditions named on the back of the constitution and laws then in force said constitution and laws, the ones referred to above—"The constitution and laws of this fraternity" and if he

fails to comply with what else? "Such by-laws and rules as are or may be adopted by the sovereign camp, head camp or the camp of the jurisdiction of which he is a member at the date of his decease."

An inspection of the constitution and laws of this order for 1913, will reveal that they consist of: 1st, The constitution, on page 3. 2d, Laws of the sovereign camp governing camps, on page 29. 3d, Camp by-laws on page 66. 4th, Rules of order, on page 74.

So, it will be seen, that the certificate clarifies the question of what future regulations the sovereign must comply with by confining them not to the constitution and laws, but only to the by-laws and rules. Such by-laws and rules as are, or may be adopted, etc. And there is nothing in any by-law or rule touching on the one-year limitation within which suit should be brought.

And, besides this, although the member may, in his application, agree that: "The provisions of the constitution and laws of the order now existing, or hereafter adopted, shall form a part of the certificate issued hereunder, whether printed on, or referred to in such certificate or not."

It is generally held that, notwithstanding this agreement in the application, an amendment will not be interpreted to be retroactive in its operation unless by its terms, it is clearly intended to be so. *Strauss v. Mutual Reserve, etc.*, 83 A. S. R. 714-715; *Grant v. I. O. S. & D. of Jacob*, 79 M. R. 182; *Ancient Order of United Workmen v. Brown*, 112 Ga. 545, 37 S. E. 892, and *Wist v. Grand Lodge, A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 605.

On this point it is said by Mr. Freeman, in the most valuable note to *Strauss v. Mutual Reserve Association*, 83 Am. St. Rep. 714, as follows: "Even where a benefit society has reserved the power to amend its by-laws, so as to affect the rights of pre-existing members, a new by-law or an amendment will not be interpreted to be retroactive in its operation, unless by its terms it is clearly intended to be so; but such law will be construed as operating only

in cases that come into existence after it was passed. *Wist v. Grand Lodge*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603, unless there are imperative reasons which require a retroactive application of an amended by-law, will not be given retroactive effect. *Knights Tempers, etc., Co. v. Jarman*, 104 Fed. 638, 44 C. C. A. 3; *Eodwall v. Supreme Council, etc.*, 196 N. Y. 405, 101 N. E. 1075, and *Wright v. Knights of Maccabees, etc.*, 196 N. Y. 391, 89 N. E. 1078; Cooley's Briefs on Insurance, 710 et seq., especially paragraph L, page 711, and paragraph N, p. 715, and paragraph O, p. 719; *Wist v. Grand Lodge, A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; and most particularly see the very valuable note to *Strauss v. Mutual Reserve Association*, 83 Am. St. Rep. 706, and the main case to which the note is appended, *Stewart v. Lee Mutual Fire Ins. Ass'n*, 64 Miss. 499, 30 So. 743, in harmony with the *Strauss* case in 126 N. C. 36, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; *Cancer v. Grand Lodge, etc.*, 22 Misc. Rep. 147, 48 N. Y. App. Div. 590, affirmed in 53 App. Div. 627, 65 N. Y. Supp. 6. In the case of *Ward v. David and Jonathan Lodge*, 64 Miss. 116, 43 So. 302, no property right was affected by the amendment. In the case of *Dornes v. Supreme Lodge*, 75 Miss. 466, 473, 23 So. 191, it will be seen in the opinion of the learned counsel for appellee that the deceased insured was not a member of the endowment rank when the amended by-law was adopted, and did not make his application for membership until February 8, 1894, more than one year after the adoption of the amendment. The fact that the amendment was the law of the order before he became a member of the endowment rank, makes a different case from this one."

The constitution and by-laws of 1906 in this case affect only those members who became such after the adoption of said constitution and by-laws. *Boyd v. Miss. Home Co.*, 75 Miss. 47, where a policy of insurance is provided by the company and contains inconsistent stipulations, the meaning most favorable to the insured will be given. *Manhattan, etc., v. Parker*, (Ala.), 84 So. 298.

"Equivocal provisions in a policy are construed in favor of insured." *Grand Lodge, K. of P., v. Jones*, 100 Miss 467. "The constitution and by-laws of mutual benefit society, relied on to defeat a recovery on a certificate, are to be construed strictly against the insurer and in favor of the insured." *Goodwin v. Provident Savings L. A. Society*, 32 L. R. A. 473.

"This one-year limitation was a valid one in those constitutions although only applying to certificates thereafter issued for the reason that from the adoption of the 1897 constitution up to 1906, no such section as 3127, Code 1906, had been adopted." This section reads as follows: "3127. Period of limitation not to be changed by contract. The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitation for the various causes of actions the same for all litigants."

And, in the absence of a positive prohibitory statute against contracting for a shorter period of limitation than that prescribed by the general statute of limitations, this court has held that a contract providing for a shorter period than the general statute was valid. But, contemporaneous with the enactment of section 3127, above, section 2575, Code of 1906, was enacted. That section appears in the chapter on insurance, and reads as follows: "2571. No stipulation as to jurisdiction. No company shall make any condition or stipulation in its insurance contract concerning the court or jurisdiction wherein any suit thereon may be brought nor shall they limit the time within which suit may be commenced to less than one year after the loss or injury, any such condition or stipulation shall be void."

This section negated, so far as insurance contracts were concerned, section 3127, Code 1906, and permitted insurance contracts to provide that no suit could be main-

tained unless brought within one year after the death of the insured. *Taylor v. Farmers Fire Ins. Co.*, 101 Miss. 480.

We have shown above that each constitution adopted, generally at biennial periods, was an entirely new one, superseding the preceding one, and although one constitution might have embodied some of the preceding constitution, such features if a legal impediment to their reenactment and readoption had arisen prior to such reenactment and readoption, would, for that reason, be inoperative when the constitution in which they were legally embodied was superseded by a new constitution adopted after such legal impediment had arisen. *Supreme Lodge, Knights of Pythias v. La Malta, et al.*, 95 Tenn. 157, 30 L. R. A. 838; *Grant v. I. O. S. & D. of Jacobs*, 97 Miss. 182.

The repeal of section 2575, Code 1906, brought all manner of contracts including insurance contracts within the inhibition of section 3127, Code of 1906, and made absolutely void any provision in any contract where a shorter period of limitation was prescribed than that prescribed by the general statute of limitations. Therefore, the one-year limitation clause in the 1913 constitution was a nullity, and the time for bringing an action on this policy is governed by the general statute of limitations which is six years. This contract is a written one and comes within the general statute of limitations. See *Waterworks Case*, 102 Miss. 516; *R. R. v. Oil Co.*, 111 Miss. 320.

HOLDEN, J., delivered the opinion of the court.

This is a suit to recover two thousand dollars life insurance on a benefit certificate issued by the appellant Sovereign Camp, Woodmen of the World, to one of its members, William H. Land, and payable to certain beneficiaries designated by the certificate and the constitution and by-laws of the order. The certificate was issued to Mr. Land in 1895 for the sum of one thousand dollars, but subsequently, in 1897, increased to two thousand dollars by

the issuance of a new certificate for that amount. The insured, Mr. Land, died in 1914 while in good standing in the order. Proof was made of the death of insured, and the amount of the certificate was claimed by two parties, one his stepdaughter, and the other an occupant of his home, but, neither of them being a blood relation to the deceased, payment was refused these claimants because they were not within the class of beneficiaries named in the contract of insurance.

The deceased, Land, left no wife or children or other blood relation, except the appellee herein, Mrs. Sallie Miller, who is shown by the record to be a cousin and the nearest blood relation.

The appellee, Mrs. Miller, had no knowledge of the existence of the insurance certificate at the time of the death of her relative, Mr. Land, and it was not until 1920 she found out that the certificate of insurance existed, whereupon she demanded payment, and filed this suit to recover the amount then, five years and eight months after the death of the insured. From a decree in her favor this appeal is prosecuted.

The chief contention of the appellant is that no recovery can be had by the appellee because the right to sue under the contract of insurance, as evidenced by the certificate and by-laws and constitution of the appellant order, is barred because the suit was not commenced within one year from the death of the insured, as provided by the constitution and laws of the order, which were a part of the insurance contract.

It is well to state here that at the time the first certificate was issued in 1895 there was not provision in the constitution or laws of the order which required that suits to recover the insurance must be commenced within one year after the death of the insured. However, the appellant order thereafter met biennially and enacted and adopted a new constitution and code of laws to govern the membership and the benefit insurance issued. - These new constitutions and code of laws adopted by the order every

two years included therein the provision that suit must be commenced within one year after the death of the insured. The adoption of the last constitution and code of laws, with which we are most concerned, was in 1913. The adoption of the 1913 constitution and laws annulled and superseded all previous constitutions and codes, and contained the limiting clause of one year in which the suit must be commenced. The insured died in 1914.

It is argued by appellant that the constitution and laws in force at the time the second certificate of insurance was issued and the constitution and laws of the order adopted thereafter should govern the contract and be binding upon the beneficiary, according to the terms of the application and the insurance certificate. There can be no doubt of the correctness of this position, as held by this court several times. *Newman v. S. L., K. of P.*, 110 Miss. 371, 70 So. 241, L. R. A. 1916C, 1051; *Butler v. E. H. of C. W.*, 116 Miss. 85, 76 So. 830, Ann. Cas. 1918D, 1137. So, if the provision limiting the time in which the suit must be brought is a valid stipulation, and is applicable to the appellee in this case, then the right to recover is barred.

In opposition to the position taken by the appellant, the appellee contends: First, that the stipulated limitation was not in force in 1895 when the certificate was first issued to the insured, and that when the provision was adopted in 1897 and biennially thereafter it was prospective and not retroactive in effect, and therefore had no application to the contract made previously in 1895; second, that appellee is not barred, for the reason that the provision does not affect her rights because she had no knowledge of the existence of the certificate of insurance until five years and eight months after the death of the insured, her relative, and that she then promptly claimed the benefit insurance and filed suit within one year from the time she had knowledge of her rights; third, that the provision limiting the time to one year in which to commence the suit is void because it is contrary to the law of our state, section 3127, Code 1906 (section 2491, Heming-

way's Code), which section prohibits changing by contract the general limitation of actions.

The appellant answers the latter contention of the appellee with the argument that section 2575, Code of 1906, was enacted in 1906 and was not repealed until 1912, and it gave the appellant the right as an insurance company to make the provision of limitation of action in its contracts of insurance; and, second, that when section 2575 was repealed in 1912, said section 3127, Code of 1906 (section 2491, Hemingway's Code), could have no retroactive effect upon the contract of insurance made prior to that time; that such retroactive application would be an impairment of contract and unconstitutional.

After a careful consideration of the decisive point involved, we think it unnecessary to determine the question as to whether the provision of limitation of action adopted by the appellant order in 1897 is prospective or retroactive, or both; nor do we believe it necessary to pass upon the question of whether or not the statute (section 3127, Code of 1906; Hemingway's Code, section 2491) in effect was prospective or retroactive, or both, or that it applied only to the remedy before the right of action accrued and did not go to impair the substance of the contract; and we deem it unnecessary to decide the point as to whether the provision of limitation of action barred appellee from suit, since she had no knowledge of her rights under the certificate until 1920, when she commenced suit within the stipulated time.

But the contention of appellant that the appellee is barred by the one-year limitation must fail on the ground that the provision is void, because it is in conflict with said section 3127, Code of 1906 (section 2491, Hemingway's Code).

The pathway to this conclusion is clear and unobstructed. The new constitution and code of laws of the appellant order adopted in 1913 superseded all previous constitutions and laws of the order. Therefore, when the said constitution and laws of 1913 were adopted, section 2575,

125 Miss.]

Syllabus.

Code of 1906, had long since been repealed by an act of 1912 (Laws 1912, chapter 223), which then and there brought into full force and application here said section 3127, Code of 1906 (section 2491, Hemingway's Code), which prohibited the change by contract in the limitation of actions as then prescribed by the general statute of limitation, which in this case was six years from the time the cause of action accrued; consequently it appears that the provision of limitation in the 1913 constitution and laws of the order, which adoption superseded and annulled all others, was adopted in the face of said section 3127, Code of 1906 (section 2491, Hemingway's Code), and must give way to the statute. *Supreme L., K. of P., v. La Malta*, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838.

The decree of the lower court is affirmed.

*Affirmed.*

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NATIONAL SURETY CO. v. LEE.

[88 South. 7, No. 21412.]

**JUDGMENT.** *Adjudication of United States Circuit Court of Appeals on surety's liability under appeal bond res adjudicata as against further recovery in state court.*

Where an appeal bond has been executed under an order of a judge of the United States district court, in a cause there pending, granting a writ of error to the United States circuit court of appeals, and thereafter the United States circuit court of appeals has proceeded to judgment on the bond, and has expressly adjudicated the extent of the liability of the surety on the bond, the judgment of such appellate court is *res adjudicata* of all further liability on the bond, and an additional award against the surety thereon cannot be recovered in a state court.

**APPEAL** from circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Action by Dr. C. A. Lee, administrator of the estate of Percy L. Johnson, deceased, against National Surety Company. Judgment for plaintiff, and defendant appeals, with cross-appeal by plaintiff. Affirmed on cross-appeal, and reversed and dismissed on direct appeal.

*Fulton Thompson and R. H. & J. H. Thompson*, for appellant.

*Robt. B. Mayes, Clayton D. Potter and J. A. Teat*, for appellee.

W. H. COOK, J., delivered the opinion of the court.

This is a suit predicated upon a declaration filed by the appellee, Dr. C. A. Lee, administrator of the estate of Percy L. Johnson, deceased, against the National Surety Company, and is based on a bond executed by the surety company, and from the judgment for the sum of five hundred dollars, the penalty of the bond, the surety company prosecutes this appeal.

Percy L. Johnson was killed by the collision of an automobile in which he was riding and a street car of the Jackson Light & Traction Company, and appellee, as administrator of the estate of the deceased Johnson, sued the traction company for the negligent killing of his intestate. This suit was instituted and prosecuted to a conclusion in the United States District Court in and for the Southern District of Mississippi, and resulted in a verdict and judgment in plaintiff's favor against the traction company for ten thousand dollars and costs.

This judgment was entered in the United States district court on the 10th day of May, 1919, and on the 21st day of May a petition for a writ of error to the United States circuit court of appeals was filed. This petition prayed for the allowance of a writ of error and for an

order fixing the amount of bond for a *supersedeas* in said cause, and on the same day that the petition was filed an order entered in the cause by the United States district judge, which was in the following language:

"Upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and is hereby allowed to have reviewed in the United States circuit court of appeals for the fifth circuit the judgment hereto entered herein, and that the amount of bond on said writ of error be and is hereby fixed at five hundred dollars, this, the 21st day of May, 1918."

This order was filed in the office of the clerk of the United States district court on the 6th day of June, 1918, but no bond was filed at that time. Thereafter, on the 6th day of July, 1918, the administrator procured the issuance of an execution on the judgment, and also filed suggestions of garnishment and procured the issuance of various writs of garnishment, one of which was served on the Merchants' Bank & Trust Company of Jackson, Miss. On the same day, to wit, the 6th day of July, 1918, the traction company filed a bond with the National Surety Company as surety, the penalty of which was five hundred dollars, and which was conditioned as follows:

"The condition of the foregoing bond is such that whereas, heretofore, on the 10th day of May, 1918, in the United States district court for the Southern District of Mississippi, the said plaintiff, Dr. C. A. Lee, recovered a judgment against the defendant, the Jackson Light & Traction Company, in the sum of ten thousand dollars and costs; and whereas, the said defendant, the Jackson Light & Traction Company, has prayed an appeal with *supersedeas* to the next term of the United States Circuit Court of Appeals at New Orleans, Louisiana, which said appeal was by the court granted upon the execution of a *supersedeas* bond in the penalty of five hundred dollars:

"Now, therefore, if the said Jackson Light & Traction Company shall well and truly prosecute its appeal from the judgment aforesaid to the said circuit court of appeals

and abide the judgment of that court on said appeal, then this obligation shall become void and of no effect; otherwise to remain in full force and effect as a *supersedeas* appeal bond in the said cause."

When the United States marshal was advised of the filing of this bond he ceased his efforts to levy his execution and made the following return thereon:

"Executed by handing a true copy of this writ to J. G. Sanderson for Jackson Light & T. Company. Done at Jackson, Mississippi, July 6, 1918, and as to balance of writs to be served was ordered by U. S. marshal to hold up as bond was given by plaintiff."

On the 4th day of March, 1919, the United States circuit court of appeals affirmed the judgment of the district court and rendered judgment against the surety on the writ of error bond for the costs accrued in that court; the judgment of the circuit court of appeals being in part as follows:

"It is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed;

"It is further ordered and adjudged that the plaintiff in error, Jackson Light & Traction Company, and the surety on the writ of error bond herein, National Surety Company, be condemned, *in solido*, to pay the costs of this cause in this court, for which execution may be issued out of the said district court."

After the writ of garnishment was served on the Merchants' Bank & Trust Company the garnishee answered, admitting an indebtedness to the traction company of one thousand three hundred forty dollars and thirty-two cents, but thereafter was permitted by the United States district court to withdraw its answer and move to quash the garnishment writ. The district court sustained this motion and quashed the writ of garnishment, and from this decision Dr. Lee, administrator, prosecuted a writ of error to the circuit court of appeals. That court decided that the five hundred dollar bond filed in the original cause

as not a *supersedeas* bond but merely a bond for costs; that the judgment against the traction company was not superseded by this bond; that the writ of garnishment as properly issued; and reversed the judgment of the district court. The opinion of the circuit court of appeals

that case appears in 261 Fed. 721, and the opinion states that one of the grounds of the motion to quash the writ of garnishment was that the court below had granted *supersedeas* bond of five hundred dollars and that the making of this bond had the effect to *supersede* and to annul all of the garnishment proceedings which had been taken in the cause, but the court there held that the bond was not a *supersedeas* bond, and, in passing upon the question involved, the court used the language following:

"This bond was approved by the judge, who ordered the writ of error issued. It will be noticed, however, that the writ ordered by the judge to be issued was a writ of error, and there was no mention made in his order of any *supersedeas*. It could hardly be assumed that any judge would supersede a ten thousand dollar judgment on a five hundred dollar bond. The writ actually issued, as shown on the record, was also a writ of error, but no *supersedeas*.

(1) In the first place, it will be noticed that all of the parties seem to have been under the impression that a *supersedeas* had in fact been issued, which was not the case, as all the judge ordered was that a writ of error be issued, which was done. The making of a *supersedeas* bond, and its approval by the judge, did not have the effect to supersede the proceedings in this case, and his approval of this bond must be read in the light of his ordering it a cost bond instead of a *supersedeas* bond.

It becomes, therefore, manifest that none of the garnishment proceedings taken were at all superseded, much less invalidated by the making of such bond."

After the execution of the bond in question on July 6, 1919, and while the cause was pending in the circuit court of appeals, it appears that the traction company had become insolvent, and was later adjudged a bankrupt. After

the decision by the circuit court of appeals in the garnishment proceedings, the garnishee, the Merchants' Bank & Trust Company, paid the administrator, Dr. Lee, the amount admitted by its original answer to be due the traction company and thereafter the present suit was filed in the circuit court of the first district of Hinds county. The declaration in the instant case is in three counts. The first count, in substance, alleges the execution by the defendant surety company of a *supersedeas* bond in the penalty of ten thousand dollars, the bankruptcy of the Jackson Light & Traction Company, and seeks to recover the sum of ten thousand dollars on the bond as a *supersedeas* bond. The second count alleges that at the time of the execution of the alleged *supersedeas* bond the Jackson Light & Traction Company had ample funds to satisfy the appellee's judgment, and that during the pendency of the appeal in the circuit court of appeals said traction company had dissipated its property and become wholly insolvent; and further alleges that—"although the said plaintiff could have and would have collected the said judgment, yet he was prevented from so doing, and process of execution was stayed, by the filing of the said *supersedeas* bond by the defendant herein, and the said Jackson Light & Traction Company was thereby enabled to hold its said property free from execution; and that while the penalty attempted to be stated in said bond reads in the sum of five hundred dollars, yet the legal effect of the said penalty embodied in the said bond is that the defendant became liable for the sum of ten thousand dollars, and that the said defendant undertook and did, in its said writing obligatory, indemnify this plaintiff for the full amount of the said judgment appealed from, and did, in fact and in law, undertake to supersede and secure said judgment for the full amount of the judgment."

The third count, after reciting the judgment appealed from and the execution of the bond, further alleges that—"by the filing of the said bond above referred to, upon which this defendant has become surety as aforesaid for

the full payment of the plaintiff's judgment, a stay of execution was then and there and thereby had and procured on behalf of the said Jackson Light & Traction Company, the original defendant in judgment, and the said Jackson Light & Traction Company was then and there and thereby permitted and enabled to hold all of its said property free from execution, and this plaintiff was then and there and thereby wholly prevented from collecting his said judgment; that by the said acts of the said traction company all of its property passed beyond the reach of the plaintiff, and that by virtue of such facts and the filing of such bond signed by the surety company the said National Surety Company became wholly liable to the plaintiff for the full payment of the judgment in the sum of ten thousand dollars."

To this declaration the defendant surety company filed a plea of *non est factum* and numerous special pleas. Demurrers were sustained to all of these special pleas except a third, but since the entire cause was heard before the court without the intervention of a jury it is unnecessary to discuss in detail the action of the court on the pleadings, but it will be sufficient to say that the defenses and objections presented by appellant were substantially as follows:

(1) The judgment of the United States circuit court of appeals upon the bond, the one hereinbefore quoted, adding the National Surety Company liable for the costs of said court in said case, was *res adjudicata* of the full extent to which said company was liable on said bond, and cannot be liable for any greater sum than was adjudged against it by the circuit court of appeals.

(2) The appellee, Lee, administrator, plaintiff in this case, having prosecuted a second writ of error to the circuit court of appeals and obtained the reversal of a judgment of the United States district court against him in favor of the garnished bank on the ground that the bond upon which judgment was rendered was not a *supersedeas* bond, but a mere cost bond, is estopped now to claim that the bond imposed lia-

bility on the surety thereto other than liability for costs in that case, which costs have been paid.

"(3) The conditions of the bond sued upon were fulfilled, and the bond became void by its own terms. The traction company (a) well and truly prosecuted its appeal to the United States Circuit Court of Appeals, and (b) abided by the judgment of that court. That the appeal was well and truly prosecuted is shown by the judgment of that court on the merits of the appeal, and it is admitted that its judgment, one for costs, has been paid."

The cause was submitted in the court below, upon an agreement that the court should accept in evidence and consider the printed transcript of the record of the United States circuit court of appeals for the fifth circuit in the cause entitled "*Dr. C. A. Lee, Administrator, Plaintiff in Error, v. Jackson Light & Traction Co., Defendant in Error*," together with the printed transcript of the record of the United States circuit court of appeals for the fifth district, in the cause entitled "*Dr. C. A. Lee, Administrator, Plaintiff in Error v. Jackson Light & Traction Co., and the Merchants' Bank & Trust Company, Garnishee*," together with copies of all judgments, orders, and mandates entered in said cause either by said United States circuit court of appeals or by the district court of the United States for the Southern District of Mississippi, and at the hearing of the cause in the court below there was a judgment for appellee, Lee, administrator, for the sum of five hundred dollars, the penalty named in the bond, and from this judgment the defendant surety company prosecuted an appeal, and plaintiff, Lee, prosecuted a cross-appeal.

We do not understand appellee to contend that the bond upon which this suit is based was in fact a *supersedeas* bond, but we understand the contention to be that, since appellant executed a bond that purported to be a *supersedeas* bond, and which was accepted as such, the principal having become insolvent and having been adjudged a bankrupt, the surety is now estopped to deny that the bond was a *supersedeas* bond or that the penalty was in-

sufficient to fully protect the appellee in the collection of his judgment.

If the contention of cross-appellant that, although the penalty of the bond was only five hundred dollars, he is entitled to recover the full amount of his ten thousand dollar judgment can be sustained, it must be done under the terms of section 1022, Code of 1906 (Hemingway's Code, section 742), which provides:

"When a bond, recognizance, obligation, or undertaking of any kind shall be executed in any legal proceeding, or for the performance of any public contract, or for the faithful discharge of any duty, it shall enure to the person to whom it is designed by law as a security, and be subject to judgment in his favor, no matter to whom it is made payable, nor what is its amount, nor how it is conditioned; and the persons executing such bond or other undertaking shall be bound thereon and thereby, and shall be liable to judgment or decree on such bond or undertaking as if it were payable and conditioned in all respects as prescribed by law, if such bond or other obligation or undertaking had the effect in such proceeding or matter which a bond or other undertaking, payable and conditioned as prescribed by law, would have had; and where any such bond or undertaking is not for any specified sum, it shall bind the parties executing it for the full amount for which any bond or undertaking might have been required in the state of case in which it was given."

We do not think this section has any application to appeal bonds executed in proceedings in the courts of the United States, but if it should be conceded that this statute does apply to bonds in the federal courts, we think the case of *Parsons-May-Oberschmidt Co. v. Furr et al.*, 110 Miss. 795, 70 So. 895, is conclusive against the contention made on cross-appeal. In that case this court had before it for construction section 1022, Code of 1906, and the court there said:

"It will be noted that the statute provides for the judgment on bonds that are for no 'specified sum,' but does not

provide for the amount of the judgment to be taken upon bonds where the amount is less or more than the amount prescribed by law. It merely says that a judgment may be taken on such bond, 'no matter to whom it may be payable, nor what is its amount, nor how it is conditioned.' it would seem, in the interpretation of this statute, that we should apply the maxim '*Expressio unius est exclusio alterius.*' The statute in one state of the case expressly prescribes the amount of the judgment to be entered, and in the other case does not prescribe the amount for which judgment or decree may be given. It thus seems that it was left to the court to render such judgment or decree as is authorized by the terms of the bond and rules of equity. . . .

"We also believe that, under our statute, the judgment or decree should not be for the full amount for which a bond of this character might have been required in the state of case in which it was given; but the liability of the sureties should be limited to the amount which they expressly obligated themselves to pay. . . .

"Our interpretation of the statute being, as before stated, that, inasmuch as the *supersedeas* bond was for a specified amount, the lower court should enter a decree against the appellees for the amount specified in the bond."

There does not appear to be any statute of the United States fixing the penalty of writ of error or *supersedeas* bonds, but the judge who grants the writ fixes the penalty of such bonds. In *Lee v. Jackson Light & Traction Co.* (C. C. A.), 216 Fed. 721, the circuit court of appeals says that, "it could hardly be assumed that any judge would supersede a ten thousand dollar judgment on a five hundred dollar bond," and an examination of the order granting the writ of error would have disclosed that a *supersedeas* has not in fact been granted. If the plaintiff, Lee, understood that it was intended to grant a *supersedeas*, it can hardly be assumed that he considered a five hundred dollar bond as sufficient to secure the collection of a ten thousand dollar judgment, but it does not appear that he

took any steps to have the purported *supersedeas* discharged, or to have the penalty of the bond increased, or to have his judgment enrolled in Hinds county, and upon the affirmance of the judgment by the circuit court of appeals, without objection or exception he permitted a judgment to be entered by that court adjudicating the extent of the liability on the bond to be the amount of the costs incurred on the appeal. Thereafter, the United States district court having decided in the garnishment proceedings against the Merchants' Bank & Trust Company that the garnishment writ was improperly issued for the reason that the judgment has been superseded by the execution of the bond in question, the plaintiff, Lee, prosecuted a writ of error to the circuit court of appeals, and there successfully made the contention that the bond was not a *supersedeas* bond, and secured a reversal of the judgment of the district court and a second adjudication by the appellate court that the bond was a mere cost bond, and did not operate to supersede the judgment or any proceedings to collect it. All the parties to the bond sued upon, both obligors and obligees, were parties to the suit in which the bond was executed and were subject to the jurisdiction of the United States circuit court of appeals, and in that court, with full jurisdiction of both the subject-matter and the parties, proceeded to judgment on the bond expressly adjudicated that the bond was a mere cost bond, and determined the extent of the liability of the party on the bond, we think that judgment of the appellate court was *res adjudicata* of all further liability on the bond. An appellate court of the United States having adjudicated the extent of the liability on an appeal bond lying in that court, and having rendered judgment on the bond in favor of appellee, he cannot now recover in the district court an additional award on the bond. The judgment of the court below is therefore affirmed on cross-appeal, and reversed and dismissed on direct ap-

Affirmed on cross-appeal, reversed and dismissed on direct appeal.

*Affirmed on cross-appeal.*

*Reversed and dismissed on direct appeal.*

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RUBENSTEIN *et al.* v. LYNCHBURG SHOE Co.

[88 South. 14, No. 21732.]

**FRAUDULENT CONVEYANCES.** *Conduct of business by bankrupt's wife with husband as manager without sign on building held not a violation of the Sign Statute.*

Where a shoe company sells to a customer a bill of shoes and such customer is adjudged a bankrupt and the trustee in bankruptcy sells the stock of goods, including the shoes, to a firm bidding thereon, for cash, and the money is paid, and such bidder then sells the stock of goods to the wife of the bankrupt, taking her notes therefor, and where she opens a business in her own name, in which business her husband is made manager, but buys and and sells in her name and pays out of her funds, no goods being bought in the husband's credit or with his means, the failure to have a sign on the building where the business is conducted does not make a case under the sign statute (section 4784, Code of 1906; Hemingway's Code section 3128), and it is error under such facts to grant a peremptory instruction, for the judgment creditor of the husband on the theory that the sign statutes is applicable.

APPEAL from circuit court of Bolivar county.

HON. W. A. ALCORN, JR., Judge.

Action by the Lynchburg Shoe Company against F. Rubenstein and others. Judgment for plaintiff, execution was issued, and on trial of a claimant's issue a peremptory instruction was given for plaintiff and in judgment against J. Rubenstein, defendant, and defendants appeal. Reversed and rendered.

*Norman R. Allen*, for appellant.

The seizure under this execution is predicated upon the chance sighting by attorneys for the plaintiff of a sign exhibited in front of claimant's business, advertising a mid-summer sale and which sign seems to have been the same sign used by I. Rubenstein in the town of Shaw for a similar sale and borrowed for the occasion by Mrs. F. Rubenstein.

Plaintiffs in court below undertook to justify their seizure of the claimant's stock of merchandise on the ground that Joe Rubenstein, the husband of the owner, lived with his family in the rear of the house and aided and assisted his wife in the store, although his wife worked in and about the store and in the conduct of her business as much as her husband, and we submit that plaintiff in execution is not entitled to subject the stock of F. Rubenstein to the payments of the debts of Joe Rubenstein when it is evidenced that he not only worked in and about the F. Rubenstein store at the time when there was displayed the sign referred to above, reading "Rubenstein Sale" because the evidence further shows that he also worked in and around and about the sale in Shaw, Mississippi, in I. Rubenstein's store, when he exhibited identically the same sign.

We submit that the sign "Rubenstein's Sale" was right and properly and correctly used by Mrs. F. Rubenstein and that the mere fact of the Rubenstein's working in the store does not preclude her the legitimate use of such a sign without subjecting her stock to the harsh penalty of being subject to the payment of a debt of Joe Rubenstein, and submit that she had a right to the use of the sign and that she was conducting the business in her own name and with her own means, although her husband acted as her agent and clerk as the sign did not contain the words agent, factor, or company, or the like, and cite *Schoolfield Wilkins*, 60 Miss. 238; *Harris v. Robson*, 68 Miss. 506.

We submit also that *Robson Norton Company v. Fodsey*, 111 Miss. 171, is a case in point and protects the claimant, Mrs. F. Rubenstein. We submit that under the circumstances, the case should have been continued on account of the illness of Mrs. Rubenstein, as her presence in court and oral testimony given before the jury at the time of the trial and an opportunity to explain such matters as was necessary to be explained or as would have been brought out on cross-examination, would have clearly put the case to the jury in such light that a verdict would have been returned in favor of the claimant.

We also submit that taking into consideration all of the evidence, the court erred in granting plaintiff below the peremptory instruction to find for the plaintiff.

It is the contention of claimant that there is no proof in the record to show that Joe Rubenstein conducted the business as his own, nor is there any proof in the record which shows that the sign was a permanent sign displayed at the store and failing to disclose the owner thereof, but all of the proof tends to show that the sign was a temporary one borrowed for the occasion of a mid-summer sale for a very short run of said sale, and there is proof in the record to show that the very same sign or a similar one which we submit was the same sign—was displayed in the front of the store of I. Rubenstein in Shaw, Mississippi, either just preceding or following the appearance of the sign at the Rubenstein store in Doddsville and that Joe Rubenstein worked in and about that business in Shaw during that sale the same as he had been doing in his wife's store at Doddsville.

And we submit that the proof fails to disclose a case coming under the sign board law and warranting the taking of the property of F. Rubenstein for the payment of the debt due by Joe Rubenstein, as the sign in question did not contain any of the words set forth in the statute or such similar words as to bring the case within the operation of the statute, and we respectfully ask for a re-

versal of the judgment of the lower court and a judgment entered here for the claimant and the sureties on her bond.

*Somerville & Somerville*, for appellee.

The whole testimony in the case from pages 23 to 31 show conclusively that Mrs. Fannie Rubenstein had no more interest in this business than does any other wife in the business owned, operated, managed, and conducted by her husband. Mrs. Rubenstein was not in charge of this business, she did not invest one cent in the business, she did not pay her husband any salary, and all on earth she did, if anything, was to permit her husband to use her name in a fictitious way for the purpose of defrauding his creditors, and more especially this particular creditor. The vague, general, and indefinite statements of Mrs. Rubenstein introduced by her counsel are of no effect whatever, when the court had before it the evidence of the defendant, Joseph Rubenstein, showing conclusively that his wife had no real interest in the business. In addition to this, it is admitted in this record that there was no sign in any way indicating that Joseph Rubenstein was not the owner of the business.

Opposing counsel has not attempted to in any way justify this appeal by any reference to any particular part of the testimony in the record, and we submit that the appeal cannot be justified by a fair consideration of the entire record. True it is that he did introduce the vague and indefinite statements of his client, Mrs. Rubenstein, but that evidence was entirely too flimsy to overcome the other evidence in the record, which was evidence to the point and evidence of the fact in the case, whereas her evidence was a mere generalization, just as Joseph Rubenstein gives in his opening testimony.

A court of chancery could promptly decide that the record showed that this was really the property of Joseph Rubenstein, we think, and would subject the same to the payment of this debt, regardless of the signboard statute.

We think that a court of law also has a right to look through such flimsy technicalities as have been used by Mr. and Mrs. Rubenstein and certainly the case is one for the operation of the sign board statute.

In the case of *Hamblett et al. v. Stein*, 65 Miss. 474, — So. 431, we find the statute in question was construed by Judge CAMPBELL, and the meaning of his decision is this: "This law has regard to the external indicia of ownership, and by these stamps ownership of the property to the extent of liability to the creditors of him who appears to be owner. A sign which shall proclaim the real owner is required where one owns and another conducts the business, so that the public may be informed how matters are."

The above case fully covers the case at bar, and we think settles it, because it is admitted on all hands that the defendant, Joseph Rubenstein, acted in every way as if he was the owner of this property.

In *Evans & Bright v. Henley & Carroll*, 166 Miss. 148, 5 So. 522, we find a case very similar to the one at bar, and we find that Judge COOPER there holds that the husband, being the agent of the wife and being created the vice principal, as in the case at bar, flatly and without equivocation, states: "Under such circumstances it was the duty of the principal (or of her agent), to display upon a sign at the place of business, the name of the true owner, failing in which as to the creditors of the husband, the property used or acquired in the business is to be treated as the property of the person by whom the business was ostensibly transacted. . . ."

We cannot see that there is any doubt whatsoever but that the stock of goods was liable to seizure in this case and the circuit judge agreed with us. The fact that there was a mere general statement by Rubenstein and his wife that the property belonged to his wife could make no difference, where all of the evidence showed that the statute applied. If the case had been submitted to a jury, and they had found in favor of the claimant, it would have been the

duty of the court to set aside that verdict, because it would have been contrary to the evidence in the case. That being the case, why go through any formality. The trial judge agreed with us that it was his duty to render final judgment on the evidence as submitted, and so instructed the jury.

We respectfully submit that the case should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

Joe Rubenstein, the husband of the appellant, was formerly engaged in a mercantile business in the town of Shaw, Miss., and purchased from the Lynchburg Shoe Company certain merchandise. A judgment was rendered in favor of the Lynchburg Shoe Company against J. Rubenstein. In 1915 Joe Rubenstein became a bankrupt and filed a voluntary petition in bankruptcy, but was not discharged from liability for debts in bankruptcy proceedings.

The trustee in bankruptcy proceeded to sell the entire stock of goods, and the same was bought by a firm in Memphis, Tenn., who paid the trustee the money for the goods bought. Thereafter, on the same day, this firm, who had purchased the stock, sold the same to Mrs. F. Rubenstein and instructed the trustee in bankruptcy to deliver the stock of goods to Mrs. Rubenstein, which he did, and she opened a business in Shaw, Miss., in which her husband, J. Rubenstein, worked in the capacity of manager.

Thereafter Mrs. Rubenstein moved her stock of goods to Doddsville, Miss., and some time thereafter signs were posted advertising a sale in which no initial was used. The husband, J. Rubenstein, worked in said store in Doddsville and was manager thereof, doing the buying and selling, and paying out all money in the name of F. Rubenstein.

The plaintiff in the judgment of Lynchburg Shoe Company against J. Rubenstein had a lot of shoes manufactured by the Lynchburg Shoe Company and sold to J. Rubenstein, and which were in the stock of goods sold to

Mrs. F. Rubenstein by the purchaser at the bankrupt sale, seized, under this judgment, as the property of J. Rubenstein. Mrs. F. Rubenstein filed a claimant's issue and gave bond for the forthcoming of property seized.

On the trial in the circuit court on the claimant's issue, a merchant in Doddsville, who did business next door to Rubenstein, testified that J. Rubenstein conducted the business, that he did the buying and paying the money and seemed to have full control, and that he thought he was owner of the business. It is also in proof by J. Rubenstein himself that he managed the business, doing the buying and selling in the name of F. Rubenstein to the same extent as if he owned the business. The privilege license was taken out in the name of F. Rubenstein; and J. Rubenstein and F. Rubenstein, and the trustee in bankruptcy, all testified to the sale by the trustee to the Memphis firm, and the purchase by F. Rubenstein from said firm of said property.

It appears that there was no sign over the door or on the building in which the mercantile business was conducted at Doddsville to indicate whether the business was that of F. Rubenstein or J. Rubenstein. But the testimony shows that goods were bought and checks issued in the name of F. Rubenstein, on her funds, and that she gave her notes to the Memphis firm for the merchandise when she purchased same from said firm.

The circuit court gave a peremptory instruction in favor of the Lynchburg Shoe Company, plaintiff in execution, and in judgment against J. Rubenstein. We are advised that the circuit court proceeded upon the idea that the sign statute of this state, section 4784, Code of 1906 (Hemingway's Code, section 3128) was applicable to the case and constituted a justification for the peremptory instruction. This section reads as follows:

"3128 (4784). *Business Sign, and What to Contain.*—If a person shall transact business as a trader or otherwise, with the addition of the words 'agent,' 'factor,' 'and company,' or '& Co.,' or like words, and fail to disclose

the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property."

In our opinion the sign statute is not applicable to this case. The goods involved passed into the possession of the trustee in bankruptcy and was sold by him to the Memphis firm, and the Memphis firm sold the goods to F. Rubenstein, taking her notes for the purchase money.

On the adjudication of bankruptcy against J. Rubenstein, the title to the property of J. Rubenstein passed to the trustee in bankruptcy, and if the shoe company desired to establish any preference claim as to the property sold J. Rubenstein over the other creditors, it should have done so in the bankrupt court. The business, after the purchase from the Memphis firm of this stock, was opened in the name of F. Rubenstein and conducted thereafter in her name. No goods were sold to J. Rubenstein, or on the faith of his credit, or on the idea that he was the owner of the business, so far as this action is concerned.

Any person may employ a business manager for his business so long as the business is run in his own name and the goods bought and sold in such name; and the fact that J. Rubenstein acted as manager of the store, and that there was no sign indicating that F. Rubenstein was the real owner, considered alone, is insufficient to bring the case within the purview of the statute. It was, accordingly, error to give a peremptory instruction for the plaintiff in execution, but a peremptory instruction should have been given for the claimant, F. Rubenstein.

The judgment will be accordingly reversed, and judgment entered here for the appellant.

*Reversed and rendered.*

## YAZOO &amp; M. V. R. Co. v. O'KEEFE.

[88 South. 1. No. 21743.]

1. **CARRIERS.** *Carrier not required to accept unattended child of tender years, but, if it does so, is liable for neglect of duty; if carrier seeks to limit ticket agent's power to contract, limitations must be posted or brought to passenger's attention.*

The carrier of passengers is not required to accept, unattended, a child of tender years needing special attention, but it may do so, and, if it does, it is liable for injury caused by its neglect of duty. The ticket agent generally has power to make contracts for the carrier for the carriage of passengers, and such contracts are within the scope of his apparent duties. If the carrier seeks to limit his powers, it must have its rules limiting the agent's powers posted in its passenger depots, or else it must call the passenger's attention to the limitation, or bring it to his attention, to prevent liability for breach of a special contract by its ticket agent.

2. **CARRIERS.** *Instructions as to liability for carrying child past destination in violation of special contract held not erroneous.*

In a suit for damages for failure to put a child off at its destination, under a special contract so to do, to instruct the jury that, if the jury believed the ticket agent agreed that the conductor would put the child off at its destination, and that the conductor promised the same thing, and if they believed that it was within the scope of the authority of these employees to bind the railroad company by an agreement or promise made by the conductor and ticket agent, that then the defendant would be liable for the conductor's failure to put the child off, is not erroneous, where the evidence sustains such facts. The fact that the conductor was without authority to make a special contract would be immaterial, where the ticket agent had such power and did make such contract. It merely imposed on the plaintiff the necessity of proving more than was needed under the law, it being sufficient to prove that the ticket agent had power to and did make such contract, and that the carrier breached its duty thereunder.

3. **APPEAL AND ERROR.** *Carriers. Where verdict is excessive, appellate court may reverse and remand or affirm on remittitur; one thousand five hundred dollars held excessive for carrying child*

*past destination, frightening it, and causing it to contract cold.*  
Where, on a trial for carrying a child of tender years beyonds its destination in violation of a special contract, the verdict is grossly excessive, the court may reverse and remand the cause, or it may affirm on condition that plaintiff will enter a *remit-titur* to a named amount, deemed sufficient by the appellate court. The evidence examined, and verdict in this case *held* excessive.

APPEAL from circuit court of Sunflower county.

HON. S. F. DAVIS, Judge.

Action by Sidney O'Keefe against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed, with *remit-titur*.

Clinton H. McKay, for appellant.

The conductor was without authority to bind defendant by his promise to put the boy off at Blaine. *Railroad v. Kendrick*, 40 Miss. 385; *Railroad v. Statham*, 42 Miss. 607; *Sevier v. Railroad*, 61 Miss. 8; *Gage v. Railroad*. 75 Miss. 17; *Weightman v. Railway*, 70 Miss. 563. 2. The ticket agent, likewise, was without authority to do so. Same authorities, *supra*. *Gilkerson v. Atlantic C. L. R. Co.*, L. R. A. 1915-C, 664, 83 S. E. (R. S.) 592. 3. Where instructions are confusing and misleading they are ground for reversal. *Malone v. Robinson*, 12 So. (Miss.) 709. 4. Where the trial court assumes facts in his instructions which are not supported by any evidence, reversible error is committed. *Davis v. Heckle*, 118 Miss. 74; *Railroad v. Lott*, 118 Miss. 816; *Telegraph Co. v. Robertson*, 109 Miss. 775; *Railroad v. Dyer*, 102 Miss. 870. 5. Where the verdict is so excessive as to indicate passion, prejudice or unaccountable caprice on the part of the jury, a proper *re-mittitur* will be ordered. *Pullman Co. v. Anderson*, 119 Miss. 791.

Franklin and Easterling, for appellee.

Counsel for the appellant contend that the conductor was without authority to bind the defendant by his promise

to put the boy off at Blaine, and, also, that the ticket agent likewise was without authority to do so and cites several cases.

We would like to ask, if the ticket agent cannot bind the company and the conductor cannot bind the company, then who could bind the company at all? We contend that the authorities cited by counsel do not substantiate his conclusions; but, on the contrary are directly the reverse. We especially call attention of the court to the case of *Weightman v. The L. & N. O. & T. R. Co.*, reported in 70 Miss. 563; 35 A. S. R. 660. Judge Woods, in distinguishing that case from the *Sevier case*, 61 Miss. 8, 48 Am. Rep. 74.

In the *Gage case*, cited by counsel, 75 Miss., page 17, 21 So. 657, after stating the facts in that case the court speaking through CALHOUN, Special Judge, says: "There was no understanding with the ticket agent that the boy should be or needed to be especially looked after by the railroad company."

We submit that the *Gage case* is authority for the appellee in this case and conclusive authority, for in this case, the plaintiff's attention was called to the ticket agent's notice and the ticket agent informed the plaintiff's father that the company would look after him and that it was safe for him to go in the care of the conductor, and before the plaintiff was placed upon the train, the matter was called to the attention of the conductor by the plaintiff's father, who gave the conductor plaintiff's ticket and the conductor then and there agreed that he would care for the plaintiff and put him off at his destination, which he failed and neglected to do. On the same point, we call attention of the court to the case of *Wells v. Ala., G. S. R. R. Co.*, reported in 6 So., page 737; *Illinois Central R. R. Co. v. Reid*, 46 So., 146; 6 Cyc., p. 599; 5 Am. & Eng. Ency Law (2 Ed.); 2 Hutchinson on Carriers. (32 Ed.), paragraph 992.

Our own supreme court in the case of *Illinois Central R. R. Co. v. Smith*, 85 Miss. 335, 70 R. L. A. 642, 37 So. 643,

state the general rules affecting the liability of carrier.

We further call the court's attention to the case of *Troom v. Chicago, etc., Ry. Co.*, 38 Am. St. Rep. 557. See 1 R. C. L., paragraph 594; also see 6 Cyc. 599.

We submit that the facts of this case as conclusively proven in the court below, bring the case squarely within the rule announced by the decisions quoted above.

*J. B. Guthrie*, for appellee.

We shall discuss several points involved in this case in the order set out by counsel for appellant on page 13 of his brief.

1. That the conductor was without authority to bind the defendant by his promise to put the boy off at Blaine. In support of this position counsel cites certain cases from the Mississippi supreme court, and for the sake of brevity we shall not burden our brief with the same citations except to discuss the several cases cited by appellant. We desire to call special attention to the case of *Gage v. Railroad Company*, 75 Miss. 17, which is quoted in full by appellant and beginning on page 17 and ending on page 19. We call the court's special attention to this citation towards the end of that opinion, which statement by the court is as follows:

"Unless, by previous contract with the company, he was under no duty to see that the boy was put off. The company's duty ended when the station was called out, as we must presume was done, in the absence of proof to the contrary. This case bears no analogy to that of *Weightman v. Railway Co.*, 70 Miss. 563, as will appear on slight examination."

From the foregoing quotation from this case it will be observed that the court held that the conductor was under obligation to bind defendant by his promise to put the boy off at Blaine unless there was a previous contract with the company. The holding of the *Gage* case is not that a conductor may not bind his company and was not

under any duty when such promise was made by him but that such promise and duty is dependent upon the question of whether or not a previous contract had been entered into with the company for the proper care of a person traveling under disability.

We submit that no particular form of words was necessary to constitute such previous contract with the company. That any form of words which would show the disability of the party seeking transportation and any words or action on the part of the company whereby such person under disability is accepted for transportation is sufficient to constitute a contract of the character referred to in the Gage case.

Not only was the contract made before the transportation began, but it was again called to the company's notice and brought home to it when the train arrived and the father placed the boy on the train and procured the conductor's promise to put him off at Blaine.

In the case at bar there was a previous contract and, therefore, the conductor was under duty to see that the boy was put off. In the Gage case because no previous contract was shown, the court held that the company's duty ended when the station was called out, but in the case at bar, there being a previous contract the company's duty only ended when it had complied with its contract by putting the plaintiff off at his destination, and for violation of this duty a right of action accrued and the plaintiff, appellee here is entitled to recover.

The case of *Croom v. Chicago, Milwaukee & St. Paul Railroad Company*, 18 L. R. A. 602, decided by the Minnesota supreme court is a case in point. We also quote from 2 Hutchinson on Carriers (3 Ed.), p. 1316, under section 1121, where, after announcing the general rule, announces the exception as follows, to-wit: "Exceptional circumstances however, may impose this duty, as where considerations of age, sex, or physical infirmity may bring that within the scope of the conductor's duty towards a passenger, although otherwise it would be beyond the limit of

such obligation. But, it must appear that the conductor knew such exceptional facts in order to bind the company."

And in the footnote 20, *Railway Co. v. Boyles*, 11 Tex. Civ. App., 522, 33 S. W. 247, there is the following statement: "Where a female passenger is deaf, and the name of the station is announced by the porter, it being a station short of her destination, and she alights supposing that her destination has been reached, the carrier is not liable for failure to carry her to destination where the servants in charge of the train had no notice of her infirmity," the implication being that if the employees had known of the infirmity the railroad company would have been liable. *Weir-ling v. St. Louis, etc., Ry. Co.*, 115 Ark. 505, 171 S. W. 901; Annotated Cases, 1916-E, page 253; *St. Louis, etc., R. Co. v. Woodruff*, 89 Ark. 915, 16, 115, S. W. 953; Thompson on Carriers of Passengers, section 5, pages 270, 271; *Cincinnati, etc. R. Co. v. Cooper*, 120 Ind. 469, 22 N. E. 3240, 16 Am. St. Rep. 334, 6 L. R. A. 241; See, also, *Croom v. Chicago, etc., R. Co.*, 52 Minn. 296, 53 N. W. 1128, 38 Am. St. Rep. 557, 18 L. R. A. 602; 4 Elliott on Railroads, sec. 1577, p. 371, 6 Cyc. 598, and note; *Adams v. St. Louis, S. W. R. Co. (Tex.)*, 137 S. W. 437.

We might continue to cite case after case on the exceptions to the general rule, but we shall stop here by citing one other case from the Mississippi Supreme Court, the case of *Weightman v. Railway Company*, 70 Miss. 563. To the same effect will be found *Railroad Co. v. Moore*, 83 Va. 827; *Railroad Co. v. Weber, Adm'r*, 33 Kan. 543; *Railroad Co. v. Powell, Admr.*, 40 Ind. 37; *Haley, Admr. v. Railway Co.*, 21 Iowa, 15; *Railway Co. v. Miller*, 19 Mich. 305.

We submit that the holding in the foregoing cases should be the holding in the case at bar because here we have the case of an infant, six years old, with the knowledge of his tender years brought home to the ticket-agent before selling the ticket, and the assurance of the agent that it would be safe for this child to be sent, and with the knowledge also of the tender years of plaintiff being communicated to the conductor, and the conductor's promise that he

would put the boy off at Blaine, and, in addition to that the specific injunction of the conductor to the boy to sit still in his seat until he (the conductor) told the boy to get off.

Counsel argues that the case at bar bears no analogy to the Weightman case, since the basis for recovery in the Weightman case is "wanton, reckless, inhuman conduct of the defendant in putting an almost dying man from its train under the revolting circumstances set out in the declaration" and says that the duty which was breached in the Weightman case was the duty which common humanity proclaims not to wantonly or recklessly injure another and says that the case rests upon the humanitarian doctrine.

We submit to the court that the case at bar, dealing with a child six years of age, is as much within the humanitarian doctrine as that in the Weightman case, because the defendant company agreed before the ticket was sold, with full knowledge of the circumstances, and the tender years of the plaintiff, and for the defendant to breach its duty in the manner shown by this case by carrying the plaintiff past his destination and putting him off at a place where he knew nobody and where there were numbers of negroes around the depot, and a heavy rain came up during the time this child was at Sunflower and he became drenching wet, etc., was as much a breach of duty to humanity as could be said to be in the Weightman case. The only difference we can see in the two cases in that the Weightman case was more highly aggravated and Young Weightman was left without attention for a longer time, but the principle of law is identical in both the cases of appellee and the Weightman case. We must confess that we are absolutely unable to draw any distinction in the two cases from a humanitarian standpoint.

We further submit that the railroad company was bound and became liable by the action of the ticket agent and conductor, and that the question of liability under the facts in the case should have been submitted to the jury as

was done. We further submit that all other authorities cited by counsel for appellant in support of his contentions, as to the authority of the ticket agent and conductor to bind the company, are cases on the general rule and not authorities supporting the exception to the rule which we maintain is the correct solution for the case at bar.

The verdict is not excessive. Counsel for appellants contend that the amount of the verdict is manifestly excessive, and the result of passion, prejudice and unaccountable caprice on the part of the jury.

On this point we do not care to submit any authorities but we do contend that the verdict is not excessive for the reason that the injury to the plaintiff, a child of six years, put off at a station where he knew no one, and no one knew him, surrounded as he was, and as is shown by the record, by negroes and at a time when there were heavy rains, and he became drenching wet contracted a cold, became very nervous—had considerable fever and commenced having chills and fever.

ETHRIDGE, J., delivered the opinion of the court.

This is an appeal from a judgment of the circuit court for one thousand five hundred dollars in favor of the appellee, growing out of the appellee being carried by the station of his destination. The appellee, the plaintiff, at the time he was carried by his station was a minor six years old. The father of the plaintiff went to the ticket agent at Rome, Miss., and stated to him that his child was inexperienced and was not used to traveling alone, and asked the ticket agent if it would be safe to send the minor child to Blaine, Miss., in care of the conductor, and the ticket agent informed him that it would be. Thereupon plaintiff's father purchased the ticket, carried the ticket and the child to the train, and placed the child in charge of the conductor; the conductor promising to put the child off at Blaine, and taking the child to a seat and telling

him to remain there until he came for him to put him off at the right place. When the train reached Blaine the conductor forgot to put the child off and carried him past his station. After discovering that he had carried the child past his station he went to the child and told him that he would have to put him off at Sunflower, Miss., but that he would come back for him in about an hour. The child was put off at Sunflower, and the conductor on meeting the train coming back by Sunflower, told the conductor of that train about the child being left at Sunflower and requested him to take him on board his train and carry the child back to Blaine and put him off there and place him in some one's care. The conductor did so, and on the way to Blaine found a citizen on the train who would stop at Blaine and who agreed to take care of the child. The plaintiff's aunt was to meet him at the train which he first boarded at Blaine, and she did meet the train, but as the child did not get off she returned to her home in the country some three or four miles. The child testified that when he was put off the train he was alone, knew no one and was frightened, and sat down and cried. He also testified that it rained while he was at Sunflower and he got wet; that on the way to Mr. Blount's home he again got wet, and that he was nervous and excited and contracted cold, and woke up the following morning sick; that he was carried the next day to his aunt's residence, and continued sick and had chills and fever for some three or four weeks. His aunt was a trained nurse, and testified that the child was nervous and sick when he came to her home, and that he had chills and fever for three or four weeks; that she was not able to treat him successfully, and he was sent home and was there treated by a physician. The child's father testified also as to the conversation with the ticket agent and with the conductor and in reference to the child's illness after reaching home, and that the child was subsequently afraid to travel alone and was nervous and fearful to a greater extent than he had even been before. There was a verdict for one thousand five hundred dollars.

It is contended for the appellant that the conductor was without authority to bind the defendant by his promise to put the boy off the train at Blaine, and also that the ticket agent was likewise without authority to do so; that the instructions were confusing and misleading and constituted grounds for reversal; that the trial court assumed facts in the instructions which were not supported by the evidence; and that the verdict is so excessive as to indicate passion, prejudice, or unaccountable caprice on the part of the jury.

This court has held in several cases that the conductor is generally without authority to make agreements to give special attention to particular passengers, on the ground that it is contrary to public policy for him to discriminate between passengers, and that such agreements are generally without the scope of his authority. *Railroad Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Railroad v. Statham*, 42 Miss. 607, 97 Am. Dec. 478; *Sevier v. Railroad*, 61 Miss. 8, 48 Am. Rep. 74; *Gage v. Railroad*, 75 Miss. 17, 21 So. 657. It is not generally the duty of the conductor to make contracts for the railroad company as to the carriage of passengers; that duty is generally confided to the station agent or ticket agent. We think, however, that the ticket agent has authority to make contracts for the railroad company as to the carriage of passengers. Such contracts are within the scope or apparent scope of his powers and duties. The railroad company is not required to accept for carriage small children unattended, or sick persons unattended, or any person unattended who is not competent to take care of himself, but the railroad company has power to contract specially to carry such persons, and if they do so contract and carry such persons they owe them such reasonable care and attention as the circumstances call for. *Weightman v. Railroad*, 70 Miss. 563, 12 So. 586, 19 L. R. A. 671, 35 Am. St. Rep. 660; 5 Amer. & Eng. Enc. L. 538; *Croom v. Railroad Co.*, 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557.

In the present case there is nothing in the record to show that any rule forbidding a contract of this kind was called to the attention of the child's father, or that such rule was posted in a conspicuous place in the passenger depot, where it might be easily seen and read by the traveling public. We think the conversation between the ticket agent and the child's father, followed by the sale of a ticket and the placing of the child in the care of the conductor to be put off at Blaine, and the act of the conductor instructing the child to remain seated where it was placed until the conductor returned for him, constitutes a contract with the railroad-company to carry the child and put him off at his destination. Some one must represent the carrier in the transaction of its business, and a ticket agent generally is vested with power to make contracts for the railroad company, and, notwithstanding the agent testified in the case that he had no authority to make such a contract, there is nothing in the record to show that any limitation of his powers was called to the attention of the parties, or was posted in a conspicuous place in the passenger depot. In the absence of such a rule so posted or brought to the knowledge of the plaintiff's father, the railroad company must be held to have contracted with the plaintiff to put him off at his destination.

Instructions for the plaintiff, Nos. 1, 3, and 7, are complained of, and it is insisted that they told the jury, in substance, that, if they believed the ticket agent promised that the conductor would put the boy off at his destination, and the conductor also promised the same thing, and if they believed it was within the scope of the authority of these employees to bind the railroad company by an agreement or promise made by the agent and conductor, then that the defendant railroad company would be liable for the conductor's failure to put the boy off. We have examined these instructions, and we think they are not erroneous and that they come within the principles above announced. We do not think these instructions assumed facts that are not in evidence.

It is next assigned for error that the verdict is excessive. It is always a matter of some difficulty for an appellate court to say with precision what damages should be allowed for an illness resulting from a breach of duty by a railroad company. It is clear from the evidence that the illness, so far as the chills and fever were concerned, was not the result of the railroad company's breach of duty. It does appear that the child was somewhat frightened and suffered from a cold. And though the child also suffered from malaria, and probably the cold hastened the development of malaria into chills and fever, still the malaria was not caused by the breach of duty. The cold does not appear to have been serious, and if taken alone would probably not be serious. The child's evidence as to the facts bearing on getting wet and taking cold is contradicted, but that presented a question for the jury to settle; but, taking the child's testimony as true as to getting wet and being frightened and contracting cold, we still think the verdict is grossly excessive.

In our judgment the verdict should be limited to three hundred dollars, and, if the appellee will enter a remittitur of all in excess of three hundred dollars, the judgment will be affirmed; otherwise it will be reversed and remanded for a new trial.

*Affirmed, with remittitur.*

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BONDS v. MOBILE & O. R. Co.

[88 South. 161, No. 21753.]

**RAILROADS.** *Burden imposed by prima facie statute.*

Under our prima-facie statute (section 1985, Code of 1906; section 1645, Hemingway's Code), where it is shown by proof that the injury was caused by the running of cars, and it is also established that the speed of the cars was unlawful at the time of the injury, it is incumbent upon the railroad company, before it

is entitled to a peremptory instruction, to explain and show how the injury occurred, and that it was not proximately caused by its negligence in the running of the cars at an unlawful rate of speed; and, unless the evidence exonerates the railroad company from negligence proximately causing the injury, the burden imposed by the *prima-facie* statute has not been met.

APPEAL from circuit court of Lee county.

HON. C. P. LONG, Judge.

Action by Karlton Bonds against the Mobile & Ohio Railroad Company. Judgment for defendant on a peremptory instruction, and plaintiff appeals. Reversed and remanded.

*Cox & Cox*, for appellant.

The declaration contained two counts, one on the presumption statute, section 1985 of the Code of 1906, section 1645 of Hemingway's Code; and one on the excess speed statute, section 4043 of Code of 1906, section 6667 of Hemingway's Code. Upon the conclusion of the evidence on behalf of plaintiff the trial judge sustained a motion of defendant for a peremptory instruction for defendant declaring it to be a case of *res ipsa loquitur*, it being manifest beyond controversy, as the court thought, that plaintiff had attempted to catch the moving train and been jerked down and injured.

This action of the court is assigned as error; and should reverse the case and cause it to be sent back for trial on the facts by a jury. Proof of the injury by a moving train was so clear that the mind of the trial judge was satisfied upon that point. This fact is unexplained, entitled plaintiff to judgment. *Ala. & V. R. R. Co. v. Thornhill*, 106 Miss. 409; *Miss. Central R. R. Co. v. Robinson*, 106 Miss. 900. In order that the statutory presumption might be overcome, the facts and circumstances should not have been left to conjecture; the evidence must be of such a character that from it the jury can determine what these facts and

circumstances are. *Southern Ry. Co. v. Daniell*, 108 Miss. 370; *Gulf & S. I. R. R. Co. v. Boone*, 82 So. 337.

To meet the burden it was incumbent upon the defendant to put in evidence all the facts and circumstances. *Gulf & S. I. R. R. v. Boone*, 82 So. 337. The facts of the accident must be clearly shown. If the facts be not proven, and the attendant circumstances of the accident remain doubtful, the company is not relieved from liability and the presumption controls. *Railroad Co. v. Hunnicutt*, 98 Miss. 293; *N. O. & N. E. R. R. Co. v. Brooks*, 85 Miss. 274.

In the instant case the facts and circumstances attending the jury are not known. The conclusion of the trial judge that plaintiff caught hold of the moving train and was jerked or fell down with his foot upon the rail and was thus injured was pure conjecture.

In this connection the case of *R. R. Co. v. Hunnicutt*, 98 Miss. 290, was pressed upon the court by counsel for defendant and must greatly have influenced his judgment. In that case the court held that the proof of the killing of Hunnicutt by the running train of defendant was *prima-facie* proof of negligence, authorizing a recovery by plaintiff; and that to overcome this statutory presumption it devolved upon appellant to exculpate itself by establishing to the satisfaction of the jury such circumstances of excuse as would relieve it from liability. But this statutory presumption cannot be overthrown by conjecture. The circumstances of the accident must be clearly shown, and the facts so proven must exonerate the company from blame. "If the facts be not proven and the attendant circumstances of the accident remain doubtful, the company is not relieved from liability and the presumption controls." This language in quotation marks is quoted from the opinion in *N. O. & N. E. R. R. Co. v. Brooks*, 85 Miss. 274.

In connection with this case we ask the court to read the case of *I. C. R. R. Co. v. Gray*, 7950, 812.

The law of this case, for the purpose of determining the correctness of the court's action in directing a verdict for defendant, is that upon proof of the injury the defend-

ant must fully and completely exonerate itself. This rule was clearly and tersely stated by a great jurist in *Railroad Co. v. Brook*, 85 Miss. 275. It was shown beyond peradventure that the injury was inflicted by the running of the train. This was *prima-facie* proof of negligence, authorizing a recovery by plaintiff. To overcome this statutory presumption it devolved upon appellant to exculpate itself by establishing to the satisfaction of the jury such circumstances of excuse as would relieve it from liability. But this statutory presumption cannot be overthrown by conjecture. The circumstances of the accident must be clearly shown, and the facts so proven must exonerate the company from blame.

If the facts be not proven and the attendant circumstances of the accident remain doubtful, the company is not relieved from liability, and the presumption controls. This rule as stated by Judge TRULY was approved by Judge WHITFIELD, and followed in *Y. & M. V. R. R. Co. v. Landrum*, 89 Miss. 509-410.

It was approved by Justice MAYES and followed in *Easley v. Railroad Co.*, 96 Miss. 399. It was approved by McLEAN, Commissioner, and followed in *A. G. S. R. R. Co. v. Hunnicutt*, 98 Miss. 293. It was approved by Justice McLEAN and followed in *Fuller v. I. C. R. R. Co.*, 100 Miss. 724. It was approved by Justice SMITH and followed in *N. O. & N. E. R. R. Co. v. Cole*, 101 Miss. 176.

The rule as above stated requiring the defendant railroad company on proof of injury by a moving train to exculpate itself by showing facts of exoneration to the satisfaction of the jury seems to some extent to have been qualified in *A. & V. R. R. Co. v. Thornhill*, 106 Miss. 400, the court, among other things, declaring that when the facts and circumstances have been ascertained, the presumption of negligence created by the statute disappears, and the defendant's negligence *rel non* must then be determined alone from such facts and circumstances. In *Southern R. R. Co. v. Daniell*, 108 Miss. 364, this question was again considered and passed upon by the court, the opinion being

delivered by SMITH, C. J., who had delivered the opinion in the *Thornhill case, supra*; and the court admitted the contention of counsel that the rule requiring complete exculpation of defendant upon proof of injury by a running train placed too great a burden upon defendant, the court declaring that in order that the statutory presumption may be overcome, the facts and circumstances must not be left to conjecture; the evidence must be of such character that from it the jury can determine what these facts and circumstances are, but when they have been determined the statute has served its purpose and can no longer be invoked.

This brings the case squarely within a principle announced in *A. & V. R. R. Co. v. Thornhill*, 106 Miss. 409, paragraph 3 of the court's summing of the law deduced from a review of the cases reads as follows: "This *prima-facie* presumption, however is not a specific, but a general one; that is, negligence is presumed in the doing or omission of any act that could have reasonably caused the injury, and consequently, in order that it may be rebutted, the evidence must disclose the doing or omission of every act from the doing or omission of which an inference of negligence *vel non* could be drawn." We take this to mean that if upon a full disclosure of the facts anything is shown that could reasonably have caused the injury, the burden of presumed liability has not been met and the presumption raised by the statute not rebutted; and hence that judgment should go for the plaintiff. This principle was applied in *Brown v. R. R. Co.*, 103 Miss. 322.

In *R. R. Co. v. Carney*, 109 Miss. 234, there was proof of a killing by a running train of the defendant railroad company. The company undertook to meet the burden imposed by the statute by showing proper equipment of locomotive and its careful operation. However it appeared from the evidence that the employees failed to observe section 4045 of the code of 1906 as to blowing whistle or ringing bell when approaching crossing. The court says: "This was a violation of the plain mandate of the law, and

it follows that the burden of statute is never met in any instance when the facts disclosed show a violation of law or breach of duty which might reasonably have caused, or contributed to cause the injury." *I. C. R. R. Co. v. Reed* (Miss.), 74 So. 423.

The running of a train through a municipality at a speed in excess of six miles per hour is unlawful and is negligence *per se*. *Railroad Co. v. Handy*, 108 Miss. 422.

The statute was enacted to protect life and property with reference to the known danger to both in cities and towns from the rapid motion of locomotives and cars. It is designed to protect against the known imprudence of the many who need protection against themselves. It may be invoked even by trespassers. *Vicksburg R. R. Co. v. McGowan*, 62 Miss. 697; *R. R. Co. v. Carter*, 77 Miss. 516; *Stevens v. Railroad Co.*, 81 Miss. 206; *R. R. Co. v. Robinson*, 106 Miss. 902; *R. R. Co. v. Pace*, 109 Miss. 679.

Its policy is wise and beneficent, and should be promoted by the courts by giving to the statute at least a fair and reasonable construction, see *I. C. R. R. Co. v. Causey*, 106 Miss. 50. There have never been but two defenses possible where cases come within the statute: First, contributory negligence of the person injured; second, want of casual connection between excess speed and the injury.

To an action for injuries to the person inflicted by a train running at an unlawful rate of speed within the limits of a municipality only two defenses are possible, the liability being absolute unless it appears that the unlawful speed was not the cause of the injury, or that the person injured was himself guilty of negligence contributing proximately to the injury. *I. C. R. R. Co. v. Watson* (Miss.), 39 So. 70.

Since the adoption of the statute abolishing contributory negligence as a defense, only one defense is left; and while the injury in the case at bar occurred prior to adoption of that statute, contributory negligence is not pleaded and could not be invoked. The only defense possible in this case then is that the unlawful rate of speed at

which train was running when plaintiff was injured was not the proximate cause of the injury. When unlawful speed and injury to persons by running train are shown, burden of exculpation is on defendant company. A railroad company violates the statute at its peril and must hear the burden of exculpating itself. *R. R. Co. v. McGowan*, 62 Miss. 697; *Jones v. R. R. Co.*, 75 Miss. 972; *R. R. Co. v. Watson*, 39 So. 70; *R. R. Co. v. Crominiarity*, 86 Miss. 466. The question whether excess speed was the proximate cause of the injury is for the jury. *Jones v. R. R. Co.*, 75 Miss. 972; *R. R. Co. v. Watson*, 39 So. 70; *Hopson v. R. R. Co.*, 87 Miss. 794; *Brown v. R. R. Co.*, 103 Miss. 323. Nor is it necessary to impose liability that the unlawful speed be the sole proximate cause of the injury. It is enough if it contribute to bring about the injury. *R. R. Co. v. Handy*, 109 Miss. 423; *R. R. Co. v. Thomas*, 109 Miss. 548.

The question of proximate cause cannot be taken from the jury unless it is indubitably established by the evidence that the negligence of defendant did not cause, nor contribute to cause, the injury suffered. *R. R. Co. v. Watson*, 39 So. 70; *Hopson v. R. R. Co.*, 87 Miss. 794. An application of the foregoing principles to the case at bar demonstrates that a peremptory instruction for defendant should not have been given.

*J. M. Boone*, for appellee.

We say that the facts and circumstances in this case demonstrate beyond doubt that this boy was injured by approaching this train while it was passing close enough to be injured by his own act; and further meets the requirement of the law under this presumption statute as laid down by the court in the Thornhill case, 106 Miss. at 409, which was a review of all the cases on the subject up to the time; namely, "When the facts and circumstances under which the injury was inflicted have been ascertained, the presumption of negligence created by the statute

disappears and the defendant's negligence *rel non* must then be determined alone from the facts and circumstances."

Appellant in his brief attempts to distinguish the *Hunnicut case*, 98 Miss. 290, from the case at bar. In this effort, we think he fails. We consider the *Honeycutt case* a direct authority supporting the decision of the court below in this case.

Now, so far as the presumption statute is concerned, we contend that the facts and circumstances show that the act of plaintiff in the instant case was the sole cause of injury, and the fact that plaintiff on account of his age cannot be charged with negligence under the law, does not fix negligence upon the defendant railroad; and if the railroad was not guilty of negligence proximately contributing to the injury, then whether plaintiff was guilty of negligence as a fact or because under the law he cannot be charged with negligence, does not inure to the benefit of plaintiff or confer upon plaintiff any right against the railroad.

In the *Hunnicut case* the court stated the law under *prima-facie* statute as strongly as it is stated in any of the cases upon that subject, placing the burden upon the railroad as strongly as any of the cases put it, and requiring the railroad to clear up the situation as strongly as any of the cases require it, and further found it was perfectly clear that *Hunnicut* was killed by the running of a train, so as to give plaintiff the benefit of the *prima-facie* statute; and the court undertook in its opinion to state by supposition as to how the accident actually happened, and the court admitted that the different theories that the court gave as to how *Hunnicut* was injured might be said to be merely a conjecture or theory, but the court said that the physical facts and the evidence did not stop at mere conjecture but went far beyond that. We contend that the facts and circumstances in the *Hunnicut case* do not prove anything more than do the facts and circumstances in this case to relieve the railroad of liability.

Appellant relies upon the third part of the court's summing up of the law in the *Thornhill case*, 106 Miss. 409. Under the known facts in this case, what negligence is presumed in the doing of any act that would have reasonably caused the injury to this plaintiff? It is clearly shown what was being done by the employee was the moving along upon a track of a railroad train in broad daylight. Therefore, what the defendant was doing is clearly shown and not left in doubt, as required under said paragraph 3. Now what act can it be presumed that the employees handling said train omitted, which if it had not been omitted could have prevented the injury? The answer is: Nothing. What omission is defendant guilty of or could be guilty of in the light of the known facts that would cause the plaintiff's injury? The only thing that I can imagine that they could omit to do would be blowing the whistle and ringing the bell to let the plaintiff know that the train was there passing along in front of him. This omission certainly did not contribute to the injury. The engine had passed the point where the boy approached the train before they were close enough to the train to cause the engineer to apprehend that they would attempt to walk into the train, especially when there was a grown negro man walking in front of the boy.

Appellant seeks to bring to his aid in his argument on this *prima-facie* statute cases in which persons were hurt in attempting to cross the railroad ahead of the engine, where the railroad was guilty of excessive speed and failed to blow whistles and ring bells as required by statute. Those cases can possibly have no application to the facts in this case, and we will not undertake to distinguish them by citing the facts in each.

In reply to appellant's brief wherein he invokes the benefit of the six mile statute, we say that all the cases referred to in appellant's brief upon this subject to the six mile statute are cases in which the persons injured were attempting to cross the track or on the track in front of the locomotive, and the circumstances show that had it

not been for the excessive speed, it was clear that the parties would have been off the track and out of the way, thus clearly showing the excess speed contributed to the injury. The only case different from this cited by him is the *Jones Case*, 75 Miss. 972, in which a dog attempted to run under a fast moving train. It is perfectly clear in the *Jones case* that when you consider the agility of a dog and the speed with which he could pass under a train, as the opening is sufficiently large for him to go through unhindered, that the speed of the train would have something to do with him getting across from one side to the other before the wheels would hit him. We do not consider the *Jones case* applicable in any respect to this case.

The rule with reference to this statute is very different when it is applied to a party attempting to get on or off a moving train, and would necessarily be different if he deliberately walks up to a moving train sufficiently close to be struck thereby. This principle is clearly illustrated in the case of *Howell v. The Railroad*, 75 Miss. 242. In this *Howell case* a boy who would have been thirteen years old his next birthday, was ordered with other boys to get off the train by the conductor, and was told that if they did not get off they would get a sweet ride through Hazelhurst by increasing the speed of the train, and that the speed of the train was increased, and that some of the boys got off. In that case the court held: "But there must be causal connection between the act causing the injury and the injury. Here, conceding the increasing of the speed of be wilful, there is no causal connection between that act and the injury. It was not the rate of speed which cause the injury but getting off, or attempting to get off, or falling off in attempting to get off, in the face of that rate of speed.

Regardless of plaintiff's age, he was a trespasser and subject to the rules of law as to trespassers. In the case of *Railroad v. Smith*, 111 Miss. 485, this principle is discussed and the rule thoroughly established as follows: "Until the engineer saw the child and her peril, he owed her no other or greater duty than that due any trespasser what-

ever. Only when the engineer sees the trespasser is a child is he brought under a rule of greater care and caution. The true rule seems to be that, although the age of the child may be important in determining the question of contributory negligence, or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers, or bare licensees, not invited or enticed by it, than it is to keep them safe for adults." "We believe that this has always been the rule of this state."

In defining "proximate cause" this court, in the case of *Billingsly v. The Railroad*, 100 Miss. 625, said: "Proximate cause is said to be a vexed metaphysical question; but it can be safely said that in order to constitute a proximate cause there must be causal connection between the injury and the negligence complained of." It will be observed in *Howell case*, *supra*, this court said that the speed of the train had no causal connection with the injury and the *Billingsly* case says there must be a causal connection in order for it to be a proximate cause. There can be no difference in principle in a case in which a party is jumping off a moving train, as in the *Howell* case, and that of one attempting to get on a moving train, as in the instant case.

Appellant seems to rely most confidently upon the case of *Jones v. The Railroad*, 75 Miss. 972, *supra*, and compares plaintiff to the dog in the *Jones* case. We do not think that the case of the boy is at all comparable with the dog case. We do not think that the *Jones* case can possibly be considered in arriving at a solution of this case. Whatever theory the court might have as to how this boy got hurt, no one can conclude or presume that this boy made an effort to crawl under the train as the dog in the *Jones* case did. If the boy had attempted to crawl across the track under the train, he would evidently have gone head foremost on his allfours and his feet being behind his body would have been between the rails as his feet crossed the rails and the boy would have been absolutely crushed to

pieces, as his whole body would have of necessity been under the train; and the fact that his foot only was touched by any part of the train demonstrates that we need not consider the Jones case, because we know that this boy was not injured by trying to crawl under the train.

We contend that, taking either of the above statutes separately or both together, it is clear that this case ought to be affirmed.

HOLDEN, J., delivered the opinion of the court.

Appellant, Karlton Bonds, sued the appellee railroad company for damages for the loss of his left foot, which was crushed by one of the appellee's trains in 1902 when the appellant was seven years of age. The injury occurred within the corporate limits of the town of Baldwin while the train was running at an unlawful rate of speed, between twelve and fifteen miles per hour. The appellant was following a negro man across the railroad track when the train was passing. The negro man crossed over or through the train to the other side of the track, but the appellant either attempted to get on the train or to cross in some way to the other side and was injured on the rail by the wheels running over his foot. After he was injured he managed to get back clear of the track where he was afterwards picked up.

At the trial the appellant did not recollect and did not testify as to how the injury occurred, except that he remembered he approached the train, but could not say in what way or how the train injured him. There was no other testimony offered to show how the injury occurred. The blood on the rail and other circumstances showed that the injury was caused by the running of the cars.

At the conclusion of the plaintiff's testimony the court sustained a motion to exclude the evidence and grant a peremptory instruction for the railroad company, from which judgment this appeal is prosecuted.

The plaintiff's declaration contained two counts, one based on our *prima-facie* negligence statute (section 1808, Code of 1892; section 1985, Code of 1906; section 1645, Hemingway's Code); and the other count was predicated on the excess speed statute in incorporated municipalities (section 3546, Code of 1892; section 4043, Code of 1906; section 6667, Hemingway's Code). The defendant railroad company pleaded the general issue. There was no plea of contributory negligence nor the statute of limitation.

The reasoning of the learned circuit judge which led to his conclusion that the appellant was not entitled to recover seems to have been based upon the theory that the evidence sufficiently disclosed the manner in which the injury occurred as to show no negligence of the railroad, and that, while the speed of the train was in violation of the law, such speed was not the proximate cause of the injury. And counsel for the appellee urges here the same reasons in support of the correctness of the judgment of the lower court.

The argument of counsel for the appellee, in substance, is that the testimony offered by the plaintiff was sufficient in explaining how the injury occurred, and could lead to no other reasonable conclusion than that the appellant, who was a trespasser, voluntarily came in contact with the moving train by either attempting to get on it, go between it, or under it to the other side of the track, and that therefore the injury resulted from no negligence of the railroad company, but was caused solely by the negligence of the appellant. In this way counsel contends that the *prima-facie* statute has been met by proof of the facts explaining the injury, and that, having thus shown no negligence on the part of the railroad company, the statute goes out of the case; and, in the absence of testimony showing that the injury was caused by the negligence of the railroad company, the appellant must fail to recover. This position might not be untenable if it were not for the fact that the negligence of the railroad company is shown by proof

of the unlawful rate of speed of the train at the time of the injury.

When the unlawful rate of speed at the time of the injury was shown, the negligence of the railroad company in that regard was established, and it became necessary for the railroad company, before it would be entitled to a peremptory instruction, to exonerate itself by proof that the negligence on account of the speed was not the proximate cause of the injury. Therefore, when the plaintiff established the fact that the injury was caused by the running of the cars and that the speed was unlawful, *per se* negligence, it was then incumbent upon the railroad to exculpate itself by showing that its negligence in running the cars did not cause the injury.

The case seems to be unusual in this, that the proof of negligence in the unlawful speed coupled with the proof of the injury by the running of the cars prevented the appellee from freeing itself under the *prima-facie* statute. The burden under the *prima-facie* statute not having been met by the railroad company, we think it was error for the lower court to grant the peremptory instruction to the defendant.

The *prima-facie* and speed statutes have been so often construed and applied by this court that we see no good purpose in discussing our decisions in that regard. The *Thornhill Case*, 106 Miss. 409, 63 So. 674, is a good discussion of the *prima-facie* statute. The *Handy Case*, 108 Miss. 422, 66 So. 783, and the *Pace Case*, 109 Miss. 667, 68 So. 926, may be cited as pertinent on the unlawful speed statute.

We know of no other case precisely like the one now before us; but it seems clear that, in order for the defendant to overcome the presumptive negligence charged against it by the *prima-facie* statute, it must appear from the evidence in the case that it was not guilty of negligence in any substantial regard at the time which resulted in the injury. That it was guilty of negligence by violation of the speed law, which negligence may or may not have proximately

caused the injury, is shown by the testimony in the case. This being true the presumption of the statute must be met in order to defeat a recovery.

The judgment of the lower court is reversed, and the case remanded.

*Reversed and remanded.*

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BALDWIN v. STATE.

[88 South. 162, No. 21711.]

INDICTMENT AND INFORMATION. *Evidence before grand jury cannot be inquired into.*

The evidence on which the grand jury acted in finding an indictment cannot be inquired into on the trial of the defendant on the indictment.

APPEAL from circuit court of Lee county.

HON. C. P. LONG, Judge.

Charley Baldwin was convicted of receiving stolen property, and he appeals. Affirmed.

*Boggan, Leake & Boggan*, for appellant.

*H. C. Holden*, assistant attorney-general, for the state.

No brief found in the record for counsel of either side.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a conviction for receiving stolen property on an indictment in which the property alleged to have been received is described as "certain dry goods and articles of wearing apparel. The exact description, further than this is to the grand jurors unknown." Each

article of wearing apparel alleged to have been received by the appellant is specifically set forth in the testimony of the state's witnesses, two of them on cross-examination testified that an itemized statement thereof was given by them to the grand jury before the finding of the indictment. A motion by the appellant to exclude the evidence and also a request by him for a directed verdict on the ground of a variation between the indictment and the proof, in that the allegation therein that "the exact description further than this is to the grand jurors unknown" appears from the evidence to be false, were both overruled. Authorities are cited by counsel for the appellant to the effect that such a variance is fatal, but they are of no value here; for the rule in this state is that no inquiry can be made into the evidence on which the grand jury acted in finding an indictment. *Smith v. State*, 61 Miss. 754; *Hammond v. State*, 74 Miss. 214, 21 So. 149.

The other assignments of error are without substantial merit.

*Affirmed.*

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SHELL *et al.*, Com'rs., v. MONBOE COUNTY.

[88 South. 162, No. 21650.]

1. HIGHWAYS. *Highway commissioners held to have no control over funds derived under statute.*

Highway commissioners appointed under the provisions of chapter 145, Laws of 1912, and its amendments (Hemingway's Code, section 7158 et seq.), have no control over the funds derived under the provisions of that statute, except that they must be paid out by the board of supervisors on the recommendation of the commissioners.

2. BRIDGES. *Supervisors' failure to use certain fund held not to invest highway commissioners or taxpayers with right to recover money paid from special fund.*

The failure of a board of supervisors to comply with the provision of chapter 176, Laws of 1914 (Hemingway's Code, section 7177),

that "it shall be the duty of the board of supervisors out of the county fund to build all bridges in districts coming under this act the cost of which exceeds twenty-five dollars, and to keep the same in repair," does not invest either the highway commissioners or a taxpayer with the right to sue for and recover from the county the amount of money paid by the board for such bridges out of the special fund derived from the sale of bonds issued or taxes levied under the statute.

APPEAL from chancery court of Monroe county.

HON. A. J. MCINTYRE, Chancellor.

Suit by J. L. Shell and others against Monroe County.  
Bill dismissed, and complainants appeal. Affirmed.

*McFarland & Holmes*, for appellant.

The legislature which gave this road district the power of raising money by taxation, can appropriate money raised by the district for one purpose, to another; the same is true of a county. The converse would also be true, and the legislature has the right to say the funds of the district shall not be expended for bridges, but that the county shall pay for the construction and maintenance of bridges. By the Acts of 1914, charter 176, section 20, this is what the legislature has said, and it is mandatory on the county to pay for the construction and maintenance of bridges in the fourth supervisors road district out of county funds. The courts have frequently held that the legislature has the right to consolidate political sub-divisions and add to or take away financial burdens; in this case it is nothing more than the legislature adding the burden of bridge construction and maintenance to the county, and taking it away from the smaller sub-division the road district. See 27 L. R. A. (N. S.) 1147 & notes; 12 C. J., sec. 628 et seq.; *Portwood v. Montgomery County*, 52 Miss. 523; L. R. A. 1915D, 274 & notes.

On the question of liability for money expended on bridge construction prior to March 28, 1914, we call the attention of the court to the fact that the construction of

roads and bridges in the district was a continuous one, mapped out at the beginning and carried through as a whole, so far as the work could be done with the funds available, and while some of these bridges had been constructed and payment made on them, yet the work of building bridges on the roads designated by the commissioners and the board of supervisors to be improved was still in progress, and would be until the funds of the district were expended or the work on the whole system completed; so that the Acts of 1914, chapter 176, passed while work was still in progress, applies to bridges built or to be built in the district. This road and bridge work was to be paid for in instalments, and there was certainly no debt due for the bridges not constructed on March 28, 1914; such being the case, on this date the road district owed nothing for bridges uncompleted, and after that date the legislature said the work should be paid for by the county and not the road district. On the question of whether or not money falling due in instalments is a debt by a political corporation or not, we refer the court to 37 L. R. A. (N. S.) 1063, where a very full discussion of this question will be found.

So we now come to the only question in the case as we see it, namely, as to whether or not the road district has the legal right to bring a suit against the county. We are unable to find any authority directly in line on this question; but applying the general rule that where one party or political corporation is made liable to another for some demand or claim, then necessarily an action will lie against the one and in favor of the other, whether there is a statute allowing such a suit or not, so long as same is not prohibited by law. As expressed in 15 C. J. 664, note 50: "Where a county is by statute made liable for a given demand, an action against it will lie therefor, although the statute does not in express terms authorize the bringing of the suit. "In this case, the Act of 1914, makes the county liable for the cost of constructing and maintaining bridges, therefore it must follow that if the county refuses to pay for same, an action will lie against it. We respectfully

submit that the action of the court in sustaining appellee's demurrer was error, and this case should be reversed and appellant allowed a chance to recover the money due by the county.

*Leftwich & Tubb*, for appellee.

A casual inspection of the good roads act, chapter 149, Acts of 1910, as well as the amended act, chapter 176, Acts of 1914, discloses no right whatever in the administrative body of the commissioners in charge of the bonded roads in supervisors district number four to sue or be sued, and they are without such power. They are of course mere administrative officers and agents of the board of supervisors. But this matter will be referred to in a later paragraph more fully. The bill is entirely silent as to when these concrete bridges were contracted for but it must be of course taken more strongly against the pleader, and the amended bill of particulars shows the first payment for a bridge on November 1, 1919, and it necessarily follows that these bridges were legally contracted for not later than 1911, perhaps before. This is admitted in the brief of counsel for appellant; on page 2 they say: "The construction of roads and bridges in the district was a continuous one, mapped out at the beginning and carried through as a whole."

So taken altogether it is very plain that the contract for all the bridges was let, and most of them constructed and paid for, before section 20, Acts of March 28, 1914, was written into the law and the other soon thereafter. Counsel in their brief seems to admit that the only possible liability of the county would be for three hundred and thirty-eight dollars and seventy-five cents expended for the repair of one bridge and forty-seven hundred dollars expended after the 28th day of March, 1914. See top of page 2 of the brief. It being admittedly true that all these bridges were contracted for by the commission and nearly all of them paid

for before the act making the county liable became a law, the county certainly can't be made liable by an *ex post facto* statute, which reads as follows:

"Sec. 20. It shall be the duty of the board of supervisors out of the county fund to build all bridges in districts coming under this act, the cost of which exceeds twenty-five dollars, and to keep the same in repair."

This statute is certainly prospective and not made retroactive by the legislature if it were necessary to do so, which we need not now discuss. The initiative in the plan and construction of these concrete bridges was taken by the commission of the fourth district. That district wanted concrete bridges and culverts. It is perfectly plain that while the county might approve the construction of concrete bridges and culvert in the fourth district with money borrowed by the Fourth district when the board of supervisors as a whole would not undertake the expense of erecting concrete bridges throughout the county with the county's money; in fact the county's revenue might make it impossible to do so. The bill don't even recite that the board of supervisors even approved the expenditure of this money by the commissioners of the fourth district of Monroe county, but avers that the fourth district through its commissioners expended the money. As all things must be presumed to have been legally done, we may be shut up to the conclusion, as there is no averment to the contrary that the board entered an order approving this action of the fourth district commissioners, but certainly that does not conclude the whole county to be responsible for a system of bridges and culverts in concrete which might be entirely impracticable, out of the county revenues as a whole.

The counsel cite *Portwood v. Montgomery County*, 52 Miss. 523, to the fact that when an addition is made to a county that the property in the addition may be by the legislature held liable for the debts theretofore contracted. Of course the state legislature is supreme in these matters in so far as they are not limited by the constitution. Here

in the instant case the legislature does not require the county to pay for bridges erected and contracted for before the act was passed, and since under the constitution the board of supervisors has full jurisdiction of roads, ferries and bridges, the legislature might be very much limited in its powers if it were to attempt to do so. A sufficient argument is that it didn't do it. And laws are certainly not retroactive if not made so in their terms, even where that is possible.

We fail to see where the author's note to *Hogan v. The Commissioners*, 37 L. R. A. (N. S.) p. 1063, applies to this point or has any relation to the concrete question here raised.

III. The fourth district of Monroe county is not vested by any statute with which we are familiar with the right and power to either sue or be sued. It is useless to enlarge on the proposition thoroughly well established in Mississippi for many years, that counties, they being vested with designated parts of the state sovereignty and a *fortiori* sub-division thereof, cannot sue or be sued except when expressly authorized by a statute. *Braham v. The Board of Supervisors*, 54 Miss. 363; *Redditt v. Wall*, 55 So. 45, 34 L. R. A. (N. S.) 152; *Grenada City v. Grenada County*, 115 Miss. 831; *Mississippi Centennial Exposition Company v. Luderback*, 86 So. 517; *Freeman v. Lee County*, 66 Miss. 1.

The Mississippi Centennial Exposition case decided only a few weeks ago is in harmony with the policy of the state that no subdivision thereof can sue or be sued unless the power so to do is literally pointed out by the statute. In *Freeman v. Lee County*, this court held that the county couldn't be sued where only a part of the county is interested, which caused the enactment of section 310, Code of 1906, of section 3683, Hemingway's Code, and there the language is: "Suit may be brought in the name of the county where only a part of the county or all its inhab-

itants are concerned, and where there is a public right of such party to be vindicated."

But the statute expressly fails to authorize any precinct or district or subdivision to sue at all, much less to sue the county. It would be an anomalous situation to give the county the right to sue itself. "The clay cannot say unto the potter, why hast thou made me thus?"

This state and states everywhere create precincts and districts and subdivisions of counties for administrative purposes; such as elections, erecting roads, school houses and the like, but no power was ever presumed or implied authorizing such subdivisions of counties to sue or be sued, it being presumed everywhere that county financial organizations, the board of supervisors and the legislature will take care of the subdivisions. See pp. 415 and 416, C. J.

IV. We are not unmindful of section 309, Code of 1906, section 3682, Hemingway's Code, providing that a county may sue and be sued, but that section does not authorize the suit in question. Here is a district of the county given power to issue bonds and build roads to suit itself, using material to meet its own need. It may be a supervisor's district or parts of two or more districts or parts of one or more counties. This district was authorized to be formed and its commission created by the board of supervisors. The commission voluntarily goes forward and builds certain kinds of bridges, cuts its garment according to the cloth—contracts and pays for them as the law and the board authorizes it to do, and after this is done by force of a statute afterwards enacted, asks its master, the county, to reimburse it for these monies lawfully paid out for the erection of these bridges and culverts; and this, too, after waiting a period of seven years or more from the time the bridges were contracted for and more than four years after all the money was admittedly paid out and after the act under which they sue was enacted. The Commissioners of the fourth district arrogate to themselves the authority to sue the master, the county, and their learned

counsel fail to anywhere point to the authority so to do. We have failed to find any such authority and certainly it would create tremendous confusion and conflict of authority to imply that every subordinate administrative body of a county could sue the county itself, forsooth for something that didn't exactly please it. Confession and anarchy would certainly result from a rule like this.

SMITH, C. J., delivered the opinion of the court.

The appellants, who were highway commissioners of Monroe county, appointed under the provisions of chapter 145, Laws of 1912, and its amendments (Hemingway's Code, section 7158 et seq.), exhibited an original bill in the court below against Monroe county by which they seek to recover something over sixteen thousand dollars, alleged to have been paid by the board of supervisors of the county out of the special fund for the building of roads derived under the provisions of the statute hereinbefore referred to for bridges built under the provisions of the statute, the cost of each of which exceeded twenty-five dollars instead of out of the county funds, as provided by section 20, chapter 176, Laws of 1914 (Hemingway's Code, section 7177). A demurrer to this bill was sustained and the appellants, who sued as highway commissioners, requested permission to amend their bill so as to indicate that they sued both as commissioners and as individual taxpayers. This request was denied and the bill was then dismissed.

A highway commission appointed under the provisions of chapter 145, Laws of 1912, which now appears as chapter 176, Laws of 1914 (Hemingway's Code, section 7158 et seq.), is simply the agent of the board of supervisors in the building and maintenance of the roads constructed under that statute, and it has no control over the funds derived either from a sale of bonds issued or from taxes levied under the provisions of the statute, except that such funds must be paid out by the board of supervisors on the recommendation of the commissioners. The appellants.

neither as commissioners nor as taxpayers, have any right to the custody of the funds obtained from the sale of bonds issued or taxes levied under the provisions of the statute, all of which must be held by the county treasurer until paid out by him on warrants issued under the orders of the board of supervisors.

One of the amendments to chapter 145, Laws of 1912, by chapter 176, Laws of 1914 (Hemingway's Code, section 7177), is the provision therein that—"It shall be the duty of the board of supervisors out of the county fund to build all bridges in districts coming under this act the cost of which exceeds twenty-five dollars, and to keep the same in repair."

This amendment applies to all bridges built after its adoption, but the failure of the board of supervisors to comply therewith does not invest either the commissioners or a taxpayer with the right to sue for and recover from the county the amount of the money paid by the board for such bridges out of the special fund derived from the sale of bonds issued or taxes levied under the statute. Whether a board of supervisors can be coerced into paying for such bridges out of the county fund, and the procedure for so doing, is not presented for decision by this record.

*Affirmed.*

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*ARMSTRONG v. EMPLOYER'S LIABILITY ASSUR. CORPORATION,  
LIMITED.*

[88 South. 163, No. 21379.]

1. *EVIDENCE. Evidence of nonpayment of judgment in fact admissible.*

Where a pending lawsuit is compromised for a certain amount which is paid to the plaintiffs and an order of dismissal taken in the case, which by agreement is set aside and a formal judg-

ment entered reciting a trial by a jury and verdict for a certain sum, which judgment was voluntarily marked satisfied by plaintiffs, testimony is admissible to show that no loss was incurred and no money actually paid out in satisfaction of this judgment.

**2. EVIDENCE. *Testimony of nonpayment of satisfaction money held not to vary court records showing satisfaction of judgment.***

This testimony does not vary, alter, contradict, or impeach the records of the court, which records show the rendition and satisfaction of the judgment.

**3. EVIDENCE. *Evidence showing no loss sustained by assured, and no money paid by him, held competent in suit on indemnity policy.***

Where a party has compromised a suit against him, and paid to the plaintiffs the sum of three thousand five hundred dollars in full settlement therefor, and had the suit dismissed, and subsequently, at the request of the insurance company, which has agreed to pay any loss by reason of liability imposed by law upon the assured (the plaintiff) for damages on account of personal injuries, and upon the request of the insurance company the order of dismissal is set aside and a judgment entered, reciting a trial by jury and a verdict in plaintiff's favor for this amount, which judgment is marked satisfied by the plaintiffs, under this insurance agreement it is competent for the insurance company to prove that no loss was sustained by the assured, and no money was paid out by him in satisfaction of the judgment, but that the amount was actually paid before the judgment was entered. This testimony in no wise impeaches the records of the court showing the entry and satisfaction of the judgment.

APPEAL from circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Action by John W. Armstrong against the Employer's Liability Assurance Corporation, Limited. Judgment for defendant, and plaintiff appeals. Affirmed.

J. N. Flowers, Ellis B. Cooper and L. K. Ramsey, for appellant.

Appellant files his suit and says that there has been imposed upon him by law the expenditure of three thousand five hundred eighteen dollars and seventy cents by reason of his having struck with his automobile the person of

one James Kelly. How is this evidenced? It is evidenced by the record in the case of *Kelly v. Armstrong*.

But appellee says that the judgment in this case does not show the true facts. The judgment actually entered shows a trial and shows a verdict. If this were true appellee must admit that it is liable. But appellee offers evidence to show that what the record says is not true. Appellee did offer evidence to show that what the record shows was not true and the court below overruled the objection. So, therefore, the first inquiry will necessarily be as to whether such testimony is competent.

This court in the case of *Sadler v. Prairie Lodge*, 59 Miss. 572, has this to say: "Such a recital as this in the judgment or decree of a domestic court of general jurisdiction cannot be contradicted or questioned in a collateral proceeding." *Cooks v. Simmons*, 57 Miss. 183; *Freeman on Judgments* (3 Ed.), section 131, and authorities cited. "So long as such a judgment remains unreversed and unassailed by some direct attack brought for the purpose of reversing or annulling it, its recitals must be respected in all collateral matters, and in all proceedings necessary for carrying out and executing it, but it may always be shown to be false by direct attack—."

In the case of *Murrah v. State*, 51 Miss. 652, it was contended on a writ of *habeas corpus* that the conviction of the appellant was improper and that the judgment was fraudulent and void and that there was no trial by jury as alleged. The judgment recited that a jury had tried the appellant but he attempted to show by parol that this was untrue. The lower court denied this contention and the appeal followed. This court said therein: "That the record imports absolute verity is a rule too well established in reason and by adjudication to be now questioned. If the impeachment of a record by parol evidence were to be permitted in a single instance, the value of records would be entirely destroyed." "No rule of law is older than the one indicated. Its antiquity is beyond ordinary research."

In the case of *Childress v. Carley*, 92 Miss. 571, 46 So. 164, this court further said: "The record being the sole embodiment of the judicial proceedings, no other materials or utterances, oral or written, can be set up in competition with it. In other words, but less correctly, the record is conclusive." This case was approved in *Stevenson v. McLeod*, 81 So. 788.

And, then again, in the case of *Mandeville v. Stockett*, 28 Miss. 398, this court said: "The record must be tried by itself. It imports absolute verity; and if the defendants desire to controvert it they must rely alone upon the record for that purpose, and introduce as their evidence, a transcript of the entire record of the judgment as entered in court, or by the court directed to be entered. The question then would be tried by comparison of the two transcripts, and not by an isolated entry of an order in the cause, or by parol evidence, as attempted by the defendants by introducing the deposition of the clerk of court." See, also, *Shirley v. Fearne*, 33 Miss. 653.

So we have the well-settled proposition, to vary, alter or contradict a record is not permissible. It is not permissible to vary, alter or contradict the terms of a contract which is in writing. This is based upon the soundest public policy, but the rule as to judgments is founded not only on this policy but on another just as far reaching.

Now, under the terms of the policy it was incumbent on this appellant to show that the sum sued for was in satisfaction of a liability imposed by law.

*Marshall & Wallace*, for appellee.

The policy of indemnity insurance being plain and unambiguous in its terms, is construed like any other contract and constituted the law governing the mutual rights and obligations of the appellant and the appellee growing out of the accidental killing of the aged veteran by the appellant's automobile. As said, this court in the case of *Penn. Mutual Life Insurance Company v. Carrie B. Gor-*

*don*, 104 Miss. 270, 61 So. 311: "What is a policy of insurance? It is the instrument setting forth the contract of insurance. It is the evidence of the agreement between the insurer and the insured. Its purpose is to show the considerations, the terms, the contract of indemnity, the privileges, the benefits, and the conditions. The usual rules for construing contracts should be applied in considering contracts of insurance."

That these policy provisions, stipulations and conditions accorded the appellee the absolute right to control the question of compromise of a claim against the appellant, and not to be bound by any compromise made by the appellant save upon such conditions as the appellee might impose, is settled by all authorities, and in all jurisdictions in which the question has been raised and determined. *Schmidt & Sons Brewing Company v. Travellers Insurance Company*, 244 Pa. 286, 90 Atl. 653; *Rumford Falls Paper Company v. Fidelity & Casualty Company*, 92 Me. 574, 43 Atl. 503; *London Guaranty & Accident Company v. Illinois Central Railroad Company*, 97 Miss. 165, 52 So. 787; *St. Louis Dressed Beef Company v. Maryland Casualty Company*, 201 U. S. 172; *Butler Brothers v. American Fidelity & Casualty Company*, 120 Minn. 157, 139 N. W. 355.

That the power of an agent, whether he be an attorney or other class of agent, rests solely upon the authority conferred upon him by his principal is equally well established. And when one dealing with the agent has notice (as in this case) of the limitation of the agent's authority to bind the principal, no individual actions or statements of the agent can estop or bind the principal, because then there is no apparent authority even. *Cape County Saving Bank, et al v. Guin Lewis Grocery Company et al.* (Miss.), 86 So. 275; *Dahnke-Walker Milling Company v. T. J. Phillips* (Miss.), 117 Miss. 204, 78 So. 6; *London Guaranty & Accident Company v. Illinois Central Railroad Company*, 97 Miss. 165, 52 So. 787. And an agent may testify (as in this case) to the limit and scope of his au-

thority. *Riechman-Crosby Company v. Dinwiddie*, 117 Miss. 103, 77 So. 533, 906.

As to appellant's proposition that the entry of the jury and verdict form of judgment estops the appellee from showing the facts and circumstances of the settlement. As is the case with virtually every proposition that has no moral basis, there are many vulnerable phases to this proposition that, we take it, need only be stated, and need no argument in support of their existence.

In the first place, the contract between the appellant and the appellee required the appellee to indemnify appellant against such loss as he might suffer under a claim for damages by reason of the operation of appellant's automobile, provided the appellant did not, without appellee's consent, voluntarily assume or agree to the loss by way of compromise of the claim. Appellant did voluntarily, without the appellee's consent save upon condition that appellee should disburse only three thousand dollars, assume such loss by compromise, and paid the amount, of the loss under the compromise and not under the judgment which was meant only as a form of record receipt, entered, as appellant expressly agrees, sixteen days after appellant had paid out the money under the compromise and not under the judgment. In this unquestionably sound view of the case, there is no attack directly or indirectly upon the judgment in the form of a jury and verdict. Insofar as that judgment may be concerned, the appellant could maintain no action at all against the appellee; for having paid out nothing under the judgment as he himself admits, he sustained no loss by reason of it, and, therefore, could obtain no indemnification by reason of it. The uncontradicted proof in the record shows that the appellant suffered no loss by reason of the judgment (and loss is the criterion of indemnification) but purely by reason of the unauthorized compromise.

Since the matter is made one purely of evidence by the appellant in his brief, we call the court's attention to the fact his position would be the same had a mere written in-

strument reciting a consideration of thirty-five hundred dollars for an accord and satisfaction been drawn and executed between the appellant and the heirs of Mr. Kelly. The rule is the same. You cannot vary the terms of a written instrument by parol. And, so, would argue the appellant with equal cogency, the appellee could not show that its agreement was to pay only a part of the consideration, because the agreement was previous to the execution of the instrument, and appellant's case could not be inquired into beyond the four corners of the instrument. This, of course, is neither sense, nor law, nor justice. Yet it is the substance of appellant's position here which he contends, is purely a question of technical evidence.

Again, and from another proper viewpoint, there is no attack upon the judgment here. The judgment could have been for no more and no less than thirty-five hundred dollars, because it was based upon the amount of the unauthorized compromise, and was entered as a matter of form due to the fact that the appellant took the conduct of the Kelly case from the appellee in violation of the policy provisions. If the case were rested purely upon the judgment, and appellant "given a dose of his own medicine," the appellant would not be entitled to recover anything in this cause. But the appellee, less willing than the appellant to resort to technicality in an effort to defeat justice, is willing to treat the case fairly as it did in the court below, and to regard it as though it relinquished control of the litigation in Lincoln county upon condition that its liability should not exceed three thousand dollars. There was purely and simply a novation of the contract of indemnity insurance, based upon a consideration universally recognized as valid, and appellant is merely unable to distinguish between an attack upon a judgment and extrinsic proof as to the amount that appellee had agreed to disburse in satisfaction of a claim on account of which the judgment happened to be entered, but was not based. We submit that we have not attacked this judgment taken, as

shown by the uncontradicted proof, as a mere record satisfaction of a claim, but have proven in defense (it is agreed in the record that such was the case) that appellee's contract with appellant was to pay only three thousand dollars towards settlement of the claim of the heirs of the confederate veteran slain by appellant's automobile.

Further, while we do not attack this judgment, in answer to the appellant's shout of record verity (?) we say that an universal exception to the rule is that the doctrine can never be relied upon by a party to a cause when its invocation would operate to effectuate a fraud. And who would say, after reading the appellant's agreement of facts, the letters, and other testimony embodied in the transcript of the record, that a substantial injustice and grossly unfair advantage would not be taken of the appellee by the appellant if the appellant's position should be sustained.

Confidently believing that no cause not based upon law and substantial honesty can prevail in this court, we beg to rest this case here, and respectfully ask that the judgment of Judge PORTELL rendered in the trial of the cause below be affirmed.

SYKES, J., delivered the opinion of the court.

The appellant sued the appellee company in the circuit court for three thousand five hundred dollars, based upon an indemnity insurance policy for the amount of a judgment rendered against appellant because of the accidental striking and killing of a man by the name of Kelly by appellant's automobile while driven by a young lady. The sad accident occurred in the city of Brookhaven. At the time of this accident the appellant had an insurance policy with the appellee company. Agreement No. 1 in this policy is as follows:

"To pay any loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries, including death at any time resulting therefrom,

accidently sustained during the policy period by any person or persons, other than employees engaged in operating or caring for the automobiles covered, as the result of the ownership, maintenance or use of any of the automobiles enumerated and described in item 8 of the Declarations."

The appellee's limit of liability for one person injured under this policy was five thousand dollars. Conditions C and D of the policy are as follows:

"C. Upon the occurrence of an accident covered by this policy, the assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the corporation's home office at Boston, Mass., or to the corporation's authorized agent. If a claim is made on account of such accident the assured shall give like notice thereof with full particulars. The assured shall at all times render to the corporation all co-operation and assistance in his power.

"D. If thereafter any suit, even if groundless, is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the corporation every summons or other process as soon as the same shall have been served on him, and the corporation will, at its own cost, and subject to the limitations referred to in condition A hereof defend or at its option settle such suit in the name and on behalf of the assured."

These are the agreements material for a decision of this case.

It is unnecessary to set out in detail the pleadings. The testimony in the case is practically undisputed. Briefly stated, this testimony is as follows: That immediately after the killing of Mr. Kelly, Mr. Armstrong notified the insurance company of the accident, and the insurance company made investigation of the facts. Shortly thereafter suit was filed by the Kelly heirs against Mr. Armstrong and the young lady for forty thousand dollars. The insurance company was at once notified of this suit, and its

attorney, Mr. Marshall, took active charge of the defense. Mr. Armstrong and the young lady each employed counsel to assist in the defense, all of which was agreeable to the insurance company. Before the case came on for trial in the circuit court of Lincoln county, the question of a compromise was discussed by the attorneys of the insurance company, Mr. Armstrong, and the young lady. The attorney of the insurance company ascertained from the company that it would be willing to pay two thousand five hundred dollars in compromise of the case, and this fact was communicated to Mr. Armstrong's attorney. Later on, through its attorney, the insurance company agreed to pay three thousand dollars as its part of a settlement. In these conferences it was stated by the attorney of the insurance company that he had no authority from the company to offer any amount over the sum of three thousand dollars. The suit was pending at Brookhaven, in Lincoln county. The attorney of the young lady lived there, the attorney of Mr. Armstrong lived in Jackson, and the attorney for the insurance company lived in Bay St. Louis. It was understood that neither the insurance company's attorney nor Mr. Armstrong's attorney would come to Brookhaven until notified by the attorney of the young lady.

Shortly after the convening of the circuit court at Brookhaven the question of compromise came up between the attorney of the young lady and the attorney of the Kelly representatives, various proposals and counter proposals being suggested. These proposals were communicated to Mr. Armstrong's attorney in Jackson. This attorney got in touch with the attorney of the insurance company at Bay St. Louis, and asked him if the appellee company would not increase its offer of compromise to three thousand five hundred dollars; that there was a probability of being able to settle the case for this amount. The attorney for the insurance company at once attempted to get in touch with the proper officer of the company to see whether or not the company would increase its offer of settlement.

He failed, however, to do so, and promptly notified Mr. Armstrong's attorney at Jackson to this effect, and that he was only authorized to offer for the company three thousand dollars in compromise. The attorneys for the Kelly heirs finally agreed to settle the case for three thousand five hundred dollars, provided this amount was paid at once, and Mr. Armstrong and his attorney were notified of this fact by the Brookhaven attorney, and Mr. Armstrong promptly sent his check for three thousand five hundred in settlement of the claim. At the time this was done Mr. Armstrong and his attorney both knew that the insurance company had only offered to pay three thousand dollars as its part of the compromise. Releases were taken from the Kelly heirs when this amount was paid them, and their suit was marked dismissed upon the dockets of the court. The fact of the settlement for three thousand five hundred dollars was then communicated to the attorney of the insurance company, and he was informed that the suit had been dismissed, but that in case he preferred any other order to be entered in the case, the Brookhaven attorney courteously offered to see that it was done. The attorney of the insurance company then prepared a formal judgment to be entered in the case. This judgment recited a trial by jury, and a verdict in favor of the plaintiffs for three thousand five hundred dollars. Copies of this judgment were mailed to the Brookhaven attorney and to Mr. Armstrong's attorney in Jackson, and the judgment was duly entered on the records of the circuit court of Lincoln county, the order of dismissal having previously thereto been set aside. This judgment was entered several days before that term of the circuit court adjourned. After the adjournment of the court, the insurance company through its attorney offered to pay the three thousand dollars as its share of the amount for which the case was settled. Mr. Armstrong declined to accept this amount, claiming that under the policy the insurance company should pay the whole amount of the judgment, namely three thousand five hundred dollars, together with all costs. This the in-

insurance company declined to do, claiming that it was only liable for three thousand dollars. Before the adjournment of the circuit court of Lincoln county this judgment for three thousand five hundred dollars was marked satisfied by the Kelly heirs.

It is the contention of the appellant in this case that all of the testimony relating to agreements of settlement, the settlement itself, and the amount that the insurance company offered to pay as its part of this settlement was inadmissible, because its effect was to impeach the verity of the judgment of the circuit court of Lincoln county in this case; that the insurance company was actively in defense of this suit, wrote the judgment in the case; consequently is a privy to the judgment and is bound thereby; that this judgment recites a trial by a jury and the rendition of a verdict for three thousand five hundred dollars in favor of the plaintiffs; that under its policy of insurance (agreement No. 1) the insurance company agrees "to pay any loss by reason of the liability imposed by law upon the assured for damages on account of personal injuries;" and that the satisfied judgment is the best and only evidence of the loss sustained by the assured. The authorities relied upon by the appellant to the effect that this judgment imputes verity, and cannot be attacked or impeached, in this proceeding, except for fraud, are universally recognized in this state. The appellee is not attempting to impeach this judgment in this case. The testimony shows that the appellant did not sustain any loss because of this judgment, because he did not pay out any money by virtue of the rendition of the judgment. The money paid out by him, or the loss sustained by him, was paid out, or incurred, before the rendition of the judgment. Because of the payment of this money before the rendition of the judgment the judgment was voluntarily satisfied by the plaintiffs. The judgment itself is not impeached nor attacked by showing that the loss incurred by the appellant under agreement No. 1 of this policy was incurred before the rendition of the judgment. At the time the appellant paid

out this money he understood that the insurance company was only willing to contribute three thousand dollars of this amount; consequently he cannot recover the overplus paid out by him.

There was a peremptory instruction in appellant's favor for three thousand dollars, together with the costs of the circuit court of Lincoln county, and the judgment is affirmed.

*Affirmed.*

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PAYNE, DIRECTOR GENERAL OF RAILROADS, v. STEVENS ET AL.

[88 South. 165, No. 21763.]

1. **APPEAL AND ERROR.** *Dismissal and nonsuit. Trial. Misjoinder of parties plaintiff cannot be urged on appeal unless notice given and misjoinder pleaded below; peremptory instruction against either party proper where evidence justifies it; plaintiff may take nonsuit at any time before verdict.*

Misjoinder of party plaintiffs in a suit cannot be taken advantage of on appeal unless notice was given and the misjoinder pleaded in the lower court. It is proper to grant a peremptory instruction against either party where the evidence justifies it. It is a legal privilege of a plaintiff to take a nonsuit in a case at any time before verdict.

2. **CARRIERS.** *White passenger compelled to ride with negroes in coach designated for white persons may recover.*

Under our separate coach law (section 4059, Code of 1906; section 6687, Hemingway's Code), a white passenger who, after notice and objection to the conductor, is compelled to ride in a compartment with negroes, in a coach designated for white persons, may recover damages from the railroad for violation of the statute; and this is true even though there were other coaches on the train for white persons, and the sign designating the coach had been changed by some outside agency.

APPEAL from circuit court of Harrison county.

HON. D. M. GRAHAM, Judge.

Action by A. E. Stevens and four others against John Barton Payne, Director General of Railroads of the United States. From the judgment in favor of three of the plaintiffs, defendant appeals. Affirmed.

*Smiths, Young & Leigh*, for appellant.

The legal questions raised by this record are: 1. Can white passengers, upon a railroad, recover damages for the failure of the carrier to provide separate accommodation for the races, where the carrier has provided such accommodation and properly designated the same, but such designations have, through the interposition of third persons, been reversed so as to make it appear that the accommodations furnished for the negro race were in fact for the white race? 2. Can several persons, each traveling upon a separate rate ticket, and independent of the others, recover a single sum in one suit in satisfaction of the several damages they all claimed to have sustained?

The duty to furnish separate accommodations is statutory and when the statute has been complied with by furnishing separate cars, as was done in this case, there can be no recovery for the failure to perform that portion of the statute.

The undisputed evidence in this case shows that there were several cars upon the train in which there were no colored passengers, and that this was known to the plaintiffs. This being true there was no necessity for the designation by the conductor of the cars assigned to the white passengers, and if the plaintiffs, knowing that fact, voluntarily entered the cars occupied by negroes they cannot recover "*volenti non fit injuria*." *Bridges, Administrator, v. Tennessee Coal, Iron & Railroad Company*, 109 Ala. 287.

As several plaintiffs joined in this action it was necessary that they should have all been entitled to recover before any of them could have recovered. *Prestwood v. Mc-*

*Gowin*, 128 Ala. 267; *Southern Railway Company v. Meagher*, 238 Fed. 538. Where several sue and only one has any interest in the suit the court can, upon motion, eliminate those who have no interest, or can control the matter by charges. *Bacot v. Phoenix Insurance Co.*, 96 Miss. 223, 50 So. 729.

But where each has an interest in the transaction upon which the suit is based, but that interest is separate interest and distinct from the interest of each of the others the court cannot select the plaintiff that it will allow to recover, and deny a recovery to the others, for one would have as much right to recover as the other, and the court cannot elect between them. *Tribbette et al. v. Illinois Central Railroad Company*, 12 So. 32; *Cumberland Telephone & Telegraph Co. v. Williamson*, 57 So. 559; *Gulf & Ship Island R. Co. v. Walker et al.*, 60 So. 1014; *Newell v. Ill. Central Railroad Co.*, 63 So. 351.

The following cases to the contrary have been overruled by the case *supra*: *Tisdale v. Insurance Co. of North America*, 36 So. 568; *Johnson v. Bacon*, 45 So. 858. The court erred in not charging the jury as requested by the defendant, to find a verdict for the defendant and also erred in entering a joint judgment in favor of three plaintiffs upon the verdict of the jury.

*Mize & Mize and F. W. Elmer, Jr.*, for appellees.

Counsel in their brief present the following questions:

1. Can several persons claiming rights under separate and distinct contracts join as plaintiffs in one suit to recover a joint damage for the failure of a carrier to separate races in a particular car?

Our answer to this, is that they can where the principles controlling each case are the same, though they could not be compelled to do it. At any rate, counsel were certainly satisfied on this point in the court below as they made no objection on the ground of misjoinder. If this joinder

of plaintiffs was wrong, appellant should have taken advantage of it in the court below.

2. Whether the fact that the sign attached to the door of the car which had been assigned to colored people was by some one or other than an employee of the company, changed so as to indicate that the car had been assigned to white passengers, made it the duty of the conductor to eject the colored passengers therefrom, and turn the car over to white people, and rendered defendant liable for a failure on the part of the conductor to do this?

In reply to this, we will say that there is no evidence that this sign was changed by any one, and, further if it had been so changed, it was the duty of the conductor or other railroad officials to have informed the white people who were in the coach which was ostensibly for white people judging from this sign, that in reality they were in a negro coach and not in a white coach, so they might have acted accordingly. This the conductor did not do, and the record will disclose that the conductor assumed that they were in a white passenger coach, because the record shows that he told these passengers to tell the negroes that were in said coach to get out of the coach, which the negroes refused to do.

As to appellant's contention, made at page four of their brief, that there were several cars in said train in which there were no colored passengers, and that this was known to plaintiffs and that there was therefore no necessity for the conductor to designate the cars assigned to the white passengers, and that if the plaintiffs, knowing that fact, voluntarily entered the car occupied by negroes, they cannot recover, we have to say that the record shows that this coach which appellees entered and in which negroes were riding was labeled "For White Passengers;" that the other coaches for white passengers were jammed and crowded so that appellees could not get seats; that this other coach being labeled "For White Passengers," they had a perfect right to assume that the label was correct and that it was

for white passengers, and to act accordingly; and, when they got in there if it was in reality a negro coach and the sign was not correct, then it was the duty of the conductor to inform them that they were not in a white coach, which he did not do. It is shown by the record that there was plenty of room in the negro compartment for these negroes who were in this coach with appellees; and the record further shows that the railroad company's employees on said train realized this, because the conductor, on being complained to about the negroes being in the coach, told said white passengers to notify the negroes to get out.

At the bottom of page four of brief for appellant, counsel say: "But, where each has an interest in the transaction upon which the suit is based, but that interest is separate interest and distinct from the interest of each of the others, the court cannot select the plaintiff that it will allow to recover and deny a recovery to the others, for one would have as much right to recover as the other, and the court cannot elect between them."

To this proposition, we reply that the court did not select the plaintiffs who should recover. The court permitted a nonsuit at the instance of Norman Walker, which was proper, and, as to the other plaintiff J. R. Webb, not included in the verdict, the appellant had the court to instruct the jury that it could not find for said J. R. Webb, thereby consenting that the interest of the other three plaintiffs should be submitted to the jury, and, in this phase of the case the appellant should not now be heard to complain because the jury rendered a verdict for these three plaintiffs.

Appellant further contends that peremptory instruction for the appellant should have been given. We submit that a peremptory instruction was correctly denied appellant. This case is controlled by the cases of: *Alabama, etc., R. v. Morris*, 103 Miss. 511; *Southern Light Co. v. Compton*, 86 Miss. 269.

HOLDEN, J. delivered the opinion of the court.

This is a joint suit by the appellee Stevens and four others to recover damages from the appellant railroad company on account of having to ride, over their objection, in the same passenger coach with negroes, from Pascagoula to Biloxi. A recovery for four hundred dollars as damages was had by the appellee Stevens and two other plaintiffs. A nonsuit was taken by one of the original plaintiffs, and a peremptory instruction was granted by the court against another. The railroad appeals from the judgment of the lower court.

The appellees secured tickets and boarded the train at Pascagoula for Biloxi. They entered a coach designated by a sign "for white passengers" and occupied seats therein. They observed a number of negroes riding as passengers in the same compartment of the coach with them. They requested the negroes to vacate the compartment and go into another part of the coach, which the negroes refused to do. Presently the conductor came in and collected the tickets. The appellees complained to the conductor and requested him to remove the negroes to another part of the coach or train, and the conductor replied that he was busy and would give the matter his attention later on, and said to one of the appellees, "Tell the negroes to move out of that compartment," but the conductor made no effort to move the negroes from the seats they occupied. The appellees claim they were damaged by humiliation and embarrassment in being compelled to ride in the same car with the negroes, and the recovery was based upon a violation of the statute with reference to the separation of races on passenger trains. Section 4059, Code of 1906, section 6687, Hemingway's Code.

The appellant railroad company introduced evidence showing that the sign "for white passengers" on the coach in which the appellees rode had two sides to it, one of which read "for colored passengers;" that in some way, without the consent or knowledge of the railroad company,

this sign had been turned round so as to designate the car for white passengers when it should have been designated for color passengers; that the car was for colored passengers instead of white; and that there were other coaches on the train occupied solely by white people.

The appellant contends for a reversal upon several grounds, namely: First, that there was a misjoinder of plaintiffs in the suit; second, that the court erred in granting a peremptory instruction against one of the original plaintiffs and in permitting a nonsuit by another, because it was a joint action; third, that it was not the fault of the railroad company that the sign designating the car for white passengers had been changed from one designating it for colored passengers, and that the appellees voluntarily entered this negro coach and brought upon themselves the humiliation they complained of.

The two first contentions presented by the appellant deserve but scant consideration. There was no notice of misjoinder given by the appellant, nor was there even an objection to the joining of the plaintiffs in the suit, and, of course, misjoinder cannot be urged at this time.

As to the peremptory instruction putting one of the plaintiffs out of the case, and the nonsuit taken by another plaintiff, we know of no rule of law which prohibits the granting of a peremptory instruction against a party when the proof in the case justifies it; nor do we know of any legal reason why a party plaintiff may not take a nonsuit at any time before verdict. One of the long-established privileges of a plaintiff is to "quit complaining" and withdraw his suit.

As to the third point made by appellant, we think there would be considerable merit in it if it were not that the record in this case discloses that the appellees entered the coach designated for white passengers and took their seats, acting in the reasonable belief that they were riding in the coach provided for white people; and, more than this, they complained to the conductor about the presence of the negro passengers in the same compartment with them,

and requested the conductor to assign the negroes to a different compartment. The conductor did not inform the appellees that they were in the wrong compartment, but, on the other hand, tacitly or impliedly agreed that they were in the right part of the coach, and promised to give the matter his attention later; but this he failed to do, and the result was the appellees and the negro passengers rode together in the same compartment in violation of the statute on that subject.

The judgment of the lower court is affirmed.

*Affirmed.*

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### HAWIE v. STATE.

[88 South. 167, No. 21518.]

1. CRIMINAL LAW. *Procedure, when insanity of defendant suggested, stated.*

If, at the arraignment of a defendant charged with the commission of a crime, it is suggested or appears to the court that he may be insane, the question of his sanity *vel non* should be inquired into and determined, and, if he should be found to be then insane, his trial should not be proceeded with unless and until he recovers his sanity.

2. CRIMINAL LAW. *Test of sanity is whether defendant can make rational defense.*

The test of a defendant's sanity in an inquiry to determine whether he shall be put on trial in a criminal case is whether he can then make a rational defense.

APPEAL from circuit court of Newton county.

HON. A. J. McLAURIN, Judge.

George Hawie was convicted of murder; and he appeals.  
Reversed and remanded.

*Burch & Enoch, for appellant.*

As a general rule, but with a few exceptions, the fact that the appellant was adjudicated insane as of date January, 1919, is a conclusive presumption of his insanity since that date; but it is a rule without any exception that such a finding is a rebuttable presumption. The state made not effort to rebut this presumption.

"If the previous inquiry found incompetency of the very kind and in respect to the very same capacities now again in controversy, the prior adjudication may be both admissible and conclusive." 3 Witthaus & Becker, Forensic Medicine (2 Ed.), p. 525; *O'Reilly v. Sweeney*, 54 Misc. 408, 105 N. Y. Supp. 1033; *Foran v. Healey* (Kan.), 85 Pac. 751, and *Soules v. Robinson* (Ind.), 62 N. E. 999.

"This is the case when there has been an adjudication of incompetency to transact the ordinary affairs of life, and a committee has been appointed, therefore the incompetent is, by force of the adjudication as evidence, conclusively proven incapable of transacting such ordinary affairs of life as the making of contracts of sales, and the like." Witthaus & Becker, *supra*.

Every authority and every argument advanced by the appellee in its brief is either made in total disregard of the fact that the appellant had been adjudicated insane prior to the time that he was tried, or upon the assumption that the trial court submitted to the jury both the issue of the appellant's guilt and his sanity at the time of his trial. There is no sort of foundation to support the argument that the issue of this appellant's sanity was submitted to the jury that tried him. To the contrary, the jury was repeatedly instructed that if they believed that the defendant had sufficient intellect to know right from wrong at the time of the homicide, it was their duty to convict him and the only reference made to the defendant's present sanity at all, was in an instruction asked for by and granted to the defendant in which said instruction merely stated that in case the jury should acquit him on

the grounds of insanity, that the jury should further certify as to whether he had since recovered, or was still dangerous and should be confined in an asylum.

In other words, the jury was not to consider the mental condition of the appellant at all, except in case they should acquit him on the grounds of insanity at the time of the homicide, and then they were only considering his sanity in the light of preventing him from doing further harm to society, and not in the light as to whether he was mentally capable of making his defense.

On the first day of April, 1921, the appellant was declared by a jury to be insane to the extent that he was incapable of conducting his defense or of so advising with others that they might make his defense for him and the jury at the time of rendering this verdict had in mind a trial had under the same indictment, upon which the trial here under consideration was had. It is conceded by the learned attorney for the appellee that a state of mind once found is presumed to continue until it is disproved. If a jury just four months and nine days prior to the trial here under consideration declared this appellant insane to that extent that he should not be tried for crime, and this presumption of his mental condition followed him down to the time of the trial here under consideration, why should we consume time in talking about partial insanity and general insanity when the degree of appellant's insanity was fixed by the jury?

When the appellant filed his application for the writ of error *coram nobis* before the same judge who tried this case, setting up in the said application that he was insane at the time of his trial in January, 1919, a demurrer was interposed by the state to the said application, which said demurrer was sustained by the court upon the idea that even though the appellant was insane, and that the allegations set forth in the application were true, that that court was without power to give any relief. An appeal was taken from the sustaining of this demurrer and this court told the trial court in that cause that, in its opinion, if the

defendant was insane at the time he was tried in January, 1919, to the extent that he could not make a defense, if any he had, that the judgment sentencing him to death should be set aside, and they directed that the defendant be given a hearing on the question of his sanity at said time. An issue was made up and a jury found that the defendant was in truth and in fact insane to the said extent, at the said trial. But notwithstanding this, the trial court with these proceedings spread upon the records, forced the appellant to trial without making any sort of test of his sanity at that time. This court held in *Ricketts v. Jolliff*, 62 Miss. 440.

"Sanity is presumed until the contrary appears, and the burden of proof is on the party alleging insanity to prove it; but where a person is shown to have been generally or habitually insane at any particular period; that condition is presumed to continue, and whoever relies on a lucid interval to support a contract subsequently made with such a lunatic must prove it and show sanity and competency at the time the contract is made."

A trial court has, and should have, some discretion as to when and how a person's sanity is to be tested on the eve of a trial; otherwise, every person charged with crime could raise the question of his sanity and arbitrarily force the court into the trial of this separate issue by merely alleging that he was insane, but we say the court had no discretion in instituting a proceeding to find insanity in the mind of this appellant, as that fact had already been determined by the same court, and that determination was of record in that court at the very time appellant was forced to trial. We, therefore say, that the court should have instituted a proceeding to determine whether the appellant had recovered his sanity since the said adjudication before they put him to trial, and that when the court failed to institute such a proceeding and forced the appellant to trial, it cannot be denied that his mental condition was such that he was incapable of making his defense because of insanity, and that the death sentence was im-

posed upon him at a time when, confessedly, he was wholly incapable of understanding the nature of the proceeding against him.

*Frank Roberson*, Attorney-General, by *H. Cassedy Holden*, Assistant Attorney-General, for the state.

The trial court has a discretion under Code 1907, section 7178, as to granting defendant's motion to execute an inquisition as to his sanity at the time of the trial. *Granberry v. State*, 63 So. 975, 184 Ala. 5; *Duncan v. State*, 162 S. W. 573, 110 Ark. 523; *People v. Fountain*, 150 Pac. 341, 170 Cal. 460; *People v. Kirby*, 114 Pac. 792, 15 Cal. App. 264.

(Ill., 1914.) Cr. Code, 285, while not expressly declaring that no one can be tried for a crime while insane, does not change the common-law while to that effect, nor does it change the common-law practice, which vested in the court a discretion to determine whether the issue of insanity should be tried before accused was tried for his crime. *People v. Favrilovich*, 106 N. E. 521, 265 Ill. 11.

(Iowa, 1906.) A finding of his insanity of defendant in proceedings under Code, sections 5540-5543, collateral to a prosecution, thereby suspending the prosecution, is not conclusive that when defendant was a week later committed to the insane asylum he was insane, and so does not render inadmissible, on the question of his insanity as the time of the commission of the offense, testimony that when received into the asylum he was not insane. *State v. Grendahl*, 109 N. W. 121, 131 Iowa, 602.

(N. M., 1910.) If, during the trial, the judge concludes that there is reason to doubt accused's sanity at that time, the question of sanity should be submitted to the jury along with the principal issue, requiring a special verdict on such point. *Territory v. Kennedy*, 110 Pac. 854, 15 N. M. 556.

(N. Y. Sup., 1909.) Where accused pleaded insanity, determination by a commission, appointed before trial, that he was sufficiently sane to understand the nature of the charges against him and conduct his defense in a rational

manner, was not an adjudication as to his then condition. *People v. Lamb*, 118 N. Y. S. 389.

(1844.) To sustain a defense on the ground of insanity, it must be clearly proven that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind; as not to know the nature and quality of the acts he was doing, or if he did understand then, that he did not know that he was doing what was wrong. *Kelly v. State*, 3 S. & M. 518, 1 Mor. St. Cas. 235; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360n.

It is immaterial whether the accused is sane or insane upon other subjects if his insanity in respect to the homicide was of such a nature as to break down his capacity to distinguish between right and wrong. (1884), *Grissom v. State*, 62 Miss. 167; (1896), *Ford v. State*, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117n.

(1893.) Proof that one on trial for murder was subject to a strange infirmity, such that a sudden touch or cluck from behind would cause him to lose consciousness and self-control and strike any person near him, is no defense in the absence of evidence that the time of the killing he had been thus excited. *Thomas v. State*, 71 Miss. 345, 15 So. 237.

(1856.) To absolve from responsibility there must not only be mental delusion, but the crime must have been committed under its direct or necessary influence. *Bovard v. State*, 30 Miss. 600, 1 Mor. St. Cas. 818.

(1856.) Partial insanity is not excuse if the party can distinguish between right and wrong, and knows the act is criminal and punishable by law. *Bovard v. State*, 30 Miss. 600, 1 Mor. St. Cas. 818.

(1896.) Where the general or habitual insanity of the accused is shown on his trial for murder, the state has the burden of showing that the homicide was committed during a lucid interval; but where only temporary insanity is shown at a time anterior, without raising a reasonable doubt that it existed at the time of the homicide, the pre-

sumption of sanity dispenses with proof of lucid intervals. *Ford v. State*, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117m.

(1916.) Mere frenzy or ungovernable passion which controls the will and motives is not insanity sufficient to excuse crime. *Garner v. State*, 112 Miss. 317, 73 So. 50.

SMITH, C. J., delivered the opinion of the court.

The appellant was convicted of murder in the circuit court of Rankin county, and thereafter his counsel applied for and were refused a writ of error *coram nobis*. The petition for the writ set forth that the appellant was insane at the time of his trial, which fact was unknown to his counsel, and consequently was not made known by them to the court, and prayed that the appellant's sanity *vel non* at the time of his trial be inquired into, and, in event he should be found to have been then insane, that the verdict and judgment therein rendered should be set aside.

An order sustaining a demurrer to this petition was reversed on appeal to this court, and the cause was remanded for a determination of the question raised thereby. *Hawie v. State*, 121 Miss. 197, 83 So. 158.

The record contains no order setting aside the judgment rendered by the circuit court of Rankin county, but, on the return of the cause thereto from this court, the venue was changed to Newton county, and when the cause was called by the circuit court thereof for trial a motion was filed by the appellant's counsel, setting forth that five days prior thereto a jury, impaneled by the court for the purpose of inquiring into the question of the appellant's sanity *vel non* at the time of his conviction in the circuit court of Rankin county, after hearing the evidence relative thereto, returned the following verdict:

"We, jury No. 1, find for the plaintiff in error, in that he was insane at the time of his trial and conviction at the January, 1919, term of the circuit court of Rankin county"—and prayed that proceedings against the appellant be suspended, and that notice of his condition be

given to the chancellor of the district or to the clerk of the chancery court so that the appellant might be dealt with in accordance with the statutes relative to insane persons.

When the cause came on for trial at the next term of court, the motion made at the former term to suspend the trial because of the defendant's insanity and to report his condition to the chancellor or clerk of the chancery court was renewed, but was overruled without any inquiry being made into the appellant's then mental condition, and the cause proceeded to a trial on its merits resulting in a verdict of guilty and a judgment imposing the death penalty. The appellant did not testify on this trial, and the only defense made for him by his counsel was that he was insane at the time the homicide was committed. No question relative thereto being raised by either the Attorney General or counsel for the appellant, we will presume that the judgment rendered by the circuit court of Rankin county was regularly set aside and a new trial ordered.

"It is a rule of universal application, and founded on the broad principles of humanity, that no insane person shall be tried, sentenced to any punishment, or punished for any crime or offense, while he continues in that state." 10 Enc. P. & P. 1218.

And if, at the arraignment of a defendant charged with the commission of a crime, it is suggested or appears to the court that he may be insane, the question of his sanity *vel non* should be inquired into and determined, and, if he should be found to be then insane, his trial should not be proceeded with unless and until he recovers his sanity. *Hawie v. State*, 121 Miss. 197, 83 So. 158; 2 Bishop's Criminal Procedure (4 Ed.), 296; 22 Cyc. 1215 et seq.; 16 C. J. 789; 14 R. C. L. 59. This rule cannot be complied with by simply postponing a trial or setting aside a verdict once because of the defendant's insanity, but each time thereafter when he is again called for trial, if a doubt arises as to his sanity, the court should proceed to determine that question anew (*People v. Farrell*, 31 Cal. 576), the test of insanity each time being whether the defend-

ant can then make a rational defense (2 Bishop's Criminal Procedure [4th Ed.] 297).

That the appellant was insane at the time of his trial in the circuit court of Rankin county was conclusively established by the verdict of the jury to which that question was submitted, but the setting aside for that reason of the judgment rendered by that court would be a vain and useless proceeding if the appellant is to be again tried without it being made to appear that he had recovered his sanity.

One of the reasons assigned by the Attorney General for not reversing the judgment of the court below on the ground that the mental condition of the appellant at the time of the trial was not inquired into is that it was within the discretion of the court to, and it did, submit that question to the jury which tried the main issue, and the verdict then returned necessarily includes a finding that the appellant was then sane. Assuming for the sake of the argument that the question of a defendant's sanity *vel non* may be submitted to the jury which tried, and along with, the main issue, no such question was here submitted to that jury, as will appear from the instruction relied on as having so done which read as follows:

"The court instructs the jury in this case that, should the jury acquit the defendant on the ground of insanity, the jury shall state in the verdict that the defendant is acquitted on such ground, and, further, whether the defendant, in its opinion, has since the homicide been restored to his reason, and whether he be dangerous to the community, and if the jury certify in its verdict that the defendant is still insane and dangerous, the court will order him to be conveyed to and confined in one of the state asylums for the insane."

*Reversed and remanded.*

## ADAMS COUNTY v. NATIONAL BOX CO.

[88 South. 168, No. 21768.]

1. **TAXATION.** *Exemption of factories includes property necessary to operation only; "manufacturing plant."*

Under chapter 100, Acts 1916 (Hemingway's Code, sections 6878, 6879), the exemption allowed goes only to the manufacturing plant, which includes those things necessary in and to its operation. The act intends to exempt the real estate, buildings, machinery, improvements, and equipments, and other personal property, forming a part of, and belonging to, the plant, and essential to and necessarily used in its operation.

2. **TAXATION.** *Exemption statutes strictly construed against exemptions; exemption statute construed; raw materials and finished products not part of factory exempted.*

Exemption statutes are to be strictly construed against exemptions to persons or corporations for gain; and chapter 100, Acts 1916 (Hemingway's Code, sections 6878, 6879), does not exempt raw materials and finished products on hand belonging to a factory, as they are not a part of the manufacturing plant, nor does it exempt a steamboat used exclusively in transporting logs to the factory for manufacturing purposes, it being no essential part of the plant used directly in its operation.

3. **TAXATION.** *Objection to assessment on ground of exemption precludes company from raising regularity of assessment on appeal.*

Objection to an assessment of a company on the ground that it is exempt from taxation precludes the company from raising the point on appeal that the assessment was not made as required by law in assessing corporations, nor can such point be raised where the record evidence fails to show that the company is a corporation.

APPEAL from circuit court of Adams county.

HON. R. L. CORBAN, Judge.

Proceedings by Adams County to assess the National Box Company for personal property. Objections to the assessment were overruled by the board of supervisors, and on appeal the company's liability was fixed. From the judgment the county appeals direct, and the box company cross-appeals. Reversed on direct appeal, and affirmed on cross-appeal, and case remanded.

*Wilmer Shields*, for appellant.

The questions presented for review by this appeal and cross-appeal are: (1) Is a steamboat, of the assessed value of ten thousand dollars, navigating the Mississippi river; belonging to a corporation owning a factory exempt from taxation under chapter 100, Laws 1916, and used exclusively to convey raw materials to said factory, exempt from taxation as being a part of said factory? (2) Is the raw material to be used in such factory in the process of manufacture and the finished products thereof, while on the premises of such factory exempt from taxation under the provisions of said chapter 100, Laws 1916?

Turning to the statute invoked by appellee, we find that the exemption is granted to all permanent factories or plants of the kind hereinafter named, etc., and hence to resolve the questions raised it is only necessary to ascertain the sense in which the legislature used the words, "factories" and "plants" in this statute, for that part of the statute with which we are here concerned does not purport to exempt any property not comprehended under those terms. The standard dictionary defines "factory" as "an establishment appropriated to the manufacture of something, including the building and machinery necessary to such manufacture," and "plant" as "a set of machines, tools, etc., necessary to conduct a mechanical business; often including the buildings and grounds, or, in case of a railroad, the rolling stock, but not including material or product," and counsel for appellant has been unable to find any authoritative definition of either of said words broad enough to include raw materials, or manufactured products on hand, or a steamboat for transporting raw materials. Hence, even under the rule for construing statutes other than those granting exemptions that words in common use are to be construed in their natural, plain and ordinary signification, the claim of appellee for exemption should be denied.

But the rule is well settled, and in the case of corporations organized for profit is universal, that statutes exempting property from taxation are to be strictly construed and in all cases of doubt as to the legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power, and the burden is on the claimant to establish clearly his right to exemption. 37 Cyc. 891.

Immunity from taxation cannot be made out by inference or implication, but must be conferred in terms too clear and plain to be mistaken, and in fact admitting of no reasonable doubt. 37 Cyc. 892. This court has said, in *Yazoo & M. V. R. Co. v. Thomas*, 65 Miss. 553, that "legislation which relieves any species of property from its due proportion of the burdens of government must be so clear that there can be neither reasonable doubt nor controversy in regard to its meaning," and in *Ice Co. v. Greenville*, 69 Miss. 86, the court says: "The party pleading exemption from taxation has imposed upon him the burden of clearly showing his title to the immunity claimed, and if his right may be fairly said to remain in doubt, the claim must be denied." The court's attention is also called to *Morris Ice Company v. Adams*, 75 Miss. 410, and to the more recent cases of *Adams County v. Catholic Diocese of Natchez*, 110 Miss. 890, and *New Standard Club v. McRaven*, 111 Miss. 92, in all of which case the doctrine of strict construction of such statute is laid down.

Under a statute exempting "property used in manufacturing" it has been held that the property, to be exempt, must be used directly in the process of manufacture, and that vessels used to convey the raw product to the place of manufacture are not exempt. See 26 Ruling Case Law, sec. 287, page 330, Title, "Taxation" citing *Martin v. New Orleans*, 38 La. Ann. 397, 58 Amer. Rep. 194.

The appellee, to say the least, has fallen far short of establishing clearly its rights to the exemption claimed, and has not met and cannot meet the burden imposed upon it of showing clearly and beyond reasonable doubt and con-

troversy that the property in question is exempt from taxation under the terms of the statute invoked by it, and therefore appellant insists and submits that the judgment of the court below, in so far as it held said steamboat to be exempt from taxation should be reversed and in all other particulars affirmed, and that judgment for appellant should be entered here.

*Reed, Brandon & Bowman*, for appellee and cross-appellant.

We present briefly the following arguments in support of our contention: First: The law contemplated the exemption of factories or plants coming within the provision, from all taxation.

We reach this conclusion from a general knowledge of the purposes of the exemption granted. It was principally for no other purpose than to encourage the establishment and operation of these industries. Why then should the statute be construed so as to abrogate the provision that the said factories would be exempt from all taxation and confine it only to that specific property included in the application?

It can readily be appreciated that a factory could not at the very outset of its construction ascertain and set forth in the application every piece of property that would be placed in the plant or should form a part of the establishment. If it is held that only the property specifically described is exempt then any piece of machinery or other property afterwards placed in the plant or that may have been in the plant and not contained in the description would be liable for taxation. It is true that the law on this subject provides that the auditor shall notify the chancery clerk stating distinctly the property exempt, but we contend that this is not for the purpose of outlining in detail each and every article or piece of property exempt but simply to inform the taxing authorities that this particular factory is exempt from taxation and that the articles of description are to identify the holdings of the fac-

tory and not to restrict the taxation of these specific properties described.

Second: The National Box Company is a corporation and if it is to be taxed at all, it must be taxed in the manner provided for the assessment of corporations. The law is very plain that a corporation shall be assessed for the value of its capital stock less its real estate, and it cannot be assessed for raw materials, finished products or for any particular piece of property. We therefore say that the assessment as made cannot stand; that if assessed at all it should be in the manner provided for assessing corporations. We then say that the corporation is exempt from all taxation, because our statute so provides, and that the trial court was therefore in error in sustaining the contention of Adams county with respect to the particular items that were permitted to stand upon the assessment roll.

We further present that it was never the intention of the legislature in exempting all factories coming within this law from all taxation, to have assessed the raw materials and finished product of such plant or factory. In the first place both of these bear their just proportion of taxation without being additionally taxed, even were it contemplated that they should be so taxed. The raw material is nothing more than logs taken from real estate and which have unquestionably borne their share of taxation, and the finished product is nothing more than merchandise which immediately becomes liable for taxation, when it leaves the place from which it is manufactured. The statements of facts in this case show that the finished product manufactured by this plant was ordered and contracted for before the manufacturing thereof and that the same moved immediately from the plant from time to time as manufactured. We are sure that the legislature never intended that such factories should be offered exemptions and freedom from taxation in order to encourage their establishment and operation and then impose taxes both upon the material immediately before it was made into a

manufactured article, and follow it up immediately with another tax before it could be loaded and shipped out of the plant. It will be noted as a matter of common knowledge that logs are brought into the plant and converted into veneer probably within the course of a few days and then manufactured into boxes and re-shipped almost immediately. Does it stand to reason that it was the intention of the legislature to exempt a factory from all taxation and at the same time impose two separate taxes upon the materials used while the same are passing through the process necessary to produce articles in the finished state? We cannot believe that such was the intention of the legislature or that such is the law, but we do believe and contend that when the factories or plants of the kind named were granted exemption from all taxation that every article and character of property forming any part of its plant together with the materials actually used in the manufacture of its product are exempt from taxation.

Third: The boat was a part of the equipment of the plant and clearly entitled to exemption from taxation. The agreed statement of facts recites: "That the boat used was used exclusively by said box company in transporting logs on the Mississippi River to its plant on the bank of the Mississippi River and was purchased exclusively for that purpose."

The only way that Adams county could place said boat within its jurisdiction would be to contend that the same was a part of the plant of the National Box Company and that when it tied up at the bank of the Mississippi River as the property of this factory, that it was in Adams county and subject to taxation. The boat, of course, does not stay in Adams county, but plies the Mississippi River and as above stated the *situs* for taxation is obtained only because it forms a part of this plant and makes regular trips to and from the city of Natchez. The facts show that it is used exclusively for the handling of logs for this particular factory. It was without question purchased for the specific purpose of transporting raw materials for use of this

factory and it is just as necessarily a part of the factory as the equipment for hauling the logs up the hill from the Mississippi River as the same are unloaded from the boat. Opposing counsel has cited some case to the contrary, but the facts of this case are not before the court and we are satisfied that there is some material difference either in the statement of facts or the law governing the case; but, be that as it may, this court has never ruled upon a proposition of the kind and it is apparent even to a non-judicial mind that this boat was just as necessarily a part of the plant in question as any other part of its machinery or equipment. To assess it in Adams county is to admit that its *situs* is at the plant and therefore that it is part of the plant and the fact that it goes up and down the river makes it no different from the cable cars that go up and down the banks of the river from the plant to the water's edge and we submit with all confidence that the ruling of the trial court in this respect should be sustained.

In conclusion we again contend that this factory is exempt from all taxation for a period of five years from the date when the exemption was granted and that the ruling of the trial court should be reversed wherein the assessment was permitted to stand and that the same be affirmed wherein the assessment on the boat was abated.

HOLDEN, J. delivered the opinion of the court.

The National Box Company, located in Adams county, was assessed on the personal tax rolls of the county with certain personal property consisting of lumber, manufactured products, and certain raw materials and supplies to be used for manufacturing purposes, of the value of ten thousand dollars, and one steamboat used exclusively for transporting logs to the plant of the box company, of the value of ten thousand dollars.

The box company filed its written objection to the assessments on the ground that the box factory was exempt from all taxation for five years, under chapter 100, Laws of 1916 (Hemingway's Code, sections 6878, 6879). The objection to the assessment being overruled by the board

of supervisors, appeal was taken to the circuit court, where the judge heard the case and rendered a decision that the box company was liable for the ten thousand dollar assessment on its raw materials and finished products, but was exempt from taxation on the ten thousand dollar steamboat. From this judgment Adams county appeals direct, and the box company cross-appeals.

The agreed statement of facts is here set out as follows:

"It is hereby agreed by and between the attorneys for plaintiff and defendant that all matters involved in this suit shall be submitted to the court for hearing and decision upon the following agreed statement of facts:

"(1) That the National Box Company is a manufacturing concern established in the city of Natchez, Adams county, Miss., subsequent to the passage of chapter 100 of the Laws of 1916, and is a factory entitled to such tax exemptions as are permitted by said act.

"(2) That attached is a copy of a communication from Robert E. Wilson, Auditor of Public Accounts, upon which the tax exemption of the National Box Company is based.

"(3) That the property assessed in this proceeding is of the value and of the kind as appears on the assessment rolls of said Adams county of the year 1920; is the property of the National Box Company, and is located in Adams county, Miss.

"(4) That the boat assessed was used exclusively by said box company in transporting logs on the Mississippi river to its plant on the bank of the Mississippi river, and was purchased exclusively for that purpose.

"(5) That said plant owns and keeps on hand only such raw materials, such as logs and the lumber, and veneer made therefrom, as is necessary for turning out its finished product, and that all of its finished product is made to fill orders given before the same is manufactured, and that all of said finished product is shipped as fast as cars can be obtained, as the same is manufactured.

"(6) That the National Box Company claims that it is exempt from the payment of all taxes for a period of

five years from the date when the exemption was permitted under the provisions of said chapter 100 of the Laws of 1916, and Adams county claims that only its real estate, machinery, and equipment is exempt, and that this does not include its raw materials or finished product."

The contention of the appellant, Adams county, is that the exemption allowed the appellee, National Box Company, extended only to its factory and plant, including the land, buildings, machinery, improvements, and equipments situated on said property and belonging to said box company, and all real and personal property forming a part of said manufacturing plant; that the exemption claimed does not cover the raw materials and finished products, nor the steamboat used in transporting logs to the factory.

The cross-appellant, the box company, contends that the personal property consisting of raw materials and finished products is exempt from all taxes as a part of the factory and plant; that the steamboat was exempt as a part of the plant because it was used exclusively in transporting raw materials to the plant to be manufactured into the finished product.

After a careful consideration of the questions involved we think the conclusion of the lower court that the raw materials and finished products on hand at the plant were subject to taxation is correct; and the ruling that the boat was exempt from taxation is erroneous, under the act in question.

The exemption allowed goes only to the manufacturing plant, which includes those things necessary in and to its operation. The language of the act, "all permanent factories or plants of the kind hereinafter named . . . shall be exempt from all state, county, and levee taxation," means all of the real estate, buildings, machinery, improvements, and equipments forming a part of and belonging to the plant, or any other personal property forming a part of the plant, essential to, and necessarily used in, its operation. Exemption statutes are to be strictly con-

strued against exemptions to persons or corporations for gain; and it seems clear to us the act here involved does not grant exemption to the box company on its raw materials and finished products, but goes only to the manufacturing plant and the things necessarily used in its operation. The personal property here assessed was no essential part of the plant, and is therefore subject to taxation.

The steamboat used exclusively in transporting logs to the factory is not exempt from taxation because it is not a necessary part, or equipment, of the plant. It is not shown by the record that logs could not have been transported to the factory by other means, or that the plant could not have operated without the use of the boat to transport the materials for manufacturing purposes. Those things or equipments of the plant which are exempt from taxation must be used directly in the manufacturing operations of the factory; otherwise they are not exempt. In this view it appears that the steamboat was not exempt as a necessary part of the factory.

Another point raised by the cross-appellant is that the method of assessing the box company was void for the reason that it is a corporation, and should be assessed in the manner provided for the assessment of corporations. The point is unavailing because the objection to the assessment below was not put on this ground at all but was based upon the claim of exemption from taxation. Furthermore, the facts in this record do not show that the box company is a corporation.

The judgment of the lower court on direct appeal is reversed, affirmed on cross-appeal, and the cause remanded.

*Reversed in part, affirmed in part, and remanded.*

## JENNY v. SMITH-POWELL REALTY CO.

[88 South. 171, No. 21667.]

**BROKERS.** *Broker producing purchaser ready, willing and able to buy on specified terms, entitled to commission.*

Where a contract between a broker and his principal specifies the terms upon which the land is to be sold, the broker has performed his duty and is entitled to his commissions when he produces a purchaser, ready, able, and willing to buy the lands upon the specified terms.

**APPEAL** from chancery court of Noxubee county.

**HON. T. P. GUYTON**, Chancellor.

Suit by the Smith-Powell Realty Company against L. M. Jenny. A demurrer to the bill was overruled, and the defendant appeals. Affirmed and remanded with leave to answer.

*I. L. Dorroh*, for appellant.

This is purely a suit for real estate agent's commissions for the making of the sale of land or for presenting a purchaser for the land. We submit that is not sufficient to show or the bill to allege that they furnished a man who would likely buy from an owner who wanted to sell but it must be made to appear that the parties were tied up to the trade in such a manner to make the agreement enforceable in the courts. We submit that where the contract between the broker and the purchaser specifies the terms upon which the land is to be sold, a broker performs his duty and is entitled to his commissions when a purchaser ready, willing and able to buy on the specified terms is presented, but where terms are not specified and the actual sale is to be made by the principal, the duty is not performed until he procures a purchaser to whom the principal sells. *Johnson v. Sutton*, 94 Miss. 544. We submit

that it is not even contended that a purchaser was presented during the life of the option contract Exhibit "A" to the bill of complaint. This option expired June 21, 1919, and it was not until the 29th day of October, 1919, that the bill alleges that a purchaser was presented. During the period between June 21, 1919, and October 29, 1919, there was no contract or option to sell this land executed by the appellant to the appellees or to anyone else; the only thing that had any semblance of a contract were the series of letters from appellant to appellees and the answers thereto between August, 1919, and October, 1919, shown in Exhibits "B" to "G," no two of which contain the same terms, thus conclusively showing that the terms of sale of this land were, if any agreement could be construed from these letters whereby a binding contract could be even inferred giving appellees the right to sue for and collect commissions from appellant prior to an actual sale.

This brings us squarely within the scope of the case of *Johnson v. Sutton*, 94 Miss. 544, where it is stated that when the terms are not specified and the actual sale, if any made, will necessarily have to be made by the principal, the duty is not performed until the broker produces a purchaser to whom the principal sells.

Where a broker is engaged to negotiate or transfer certain real estate or personal property, the mere procurement of a prospective purchaser who enters into an option to buy the property but never in fact does so, is not sufficient to constitute a performance by the broker of his contract of employment and he is not entitled to his commissions. 4 R. C. L., page 315, sec. 53; See, also, 43 L. R. A. (N. S.) 91.

We submit that where a contract between a broker and his principal specified the terms on which the land is to be sold, the broker performs his duty and is entitled to his commissions when he produces a purchaser who is ready, willing and able to buy on the specified terms, but where the terms are not specified and the actual sale is to be made

by the principal, the duty is not performed until the broker produces a purchaser, to whom the principal sells. *Cook v. Smith*, 119 Miss. 375. In the above case the court very carefully reviews all of the cases and decisions of the Mississippi court relative to the sale of lands by brokers and this is the decision of the court.

In the instant case it is not even claimed by the appellees that there was any contract in existence which in any manner specified the terms on which the land was to be sold, save and except the one which expired by limitation on June 21, 1919, and which the appellees are seeking to renew and extend the provisions through and by a series of letters beginning August 29, 1919, and running through to October 23, 1919, which letters are made Exhibits "B" to "G" to the original bill herein. We submit that no terms were specified in any of these letters for the sale of the real estate, therefore the brokers were powerless to claim commissions until they produced a purchaser to whom the land was sold. For this reason we submit that this case should be reversed and judgment entered for the appellant.

In the case of *Sullivan v. Turner*, 120 Miss. 481, the appellees had a contract to sell a section of land in Coahoma county. The contract specified the terms upon which the section of land was to be sold, the amount of cash to be received, the amount of deferred payments and the kind of security to be taken therefor, very similar in all of its aspects to the option contract dated May 21, 1919. The appellee, Turner, sold the land within the limitations of the option contract but did not sell it on the exact specified terms of the option. Instead of selling it all to one man, or all in one body, taking the specified cash and procuring the security for the deferred payments as specified on all of the land in the section, the section of land was sold in three separate tracts to three separate people for a sum aggregating more than the stipulated purchase price. The court very properly held in that case that the broker had not procured purchasers on the exact terms of

the option and denied the commissions, Sullivan having refused to execute the deed. We most respectfully call the attention of the court to that case.

A very similar case is that of *Svain v. Pitts*, 120 Miss. 578, and the court in that case said: "We think it was error for the court below to refuse to grant a peremptory instruction for the defendant below, appellant here, and the judgment of the court will be reversed and judgment entered here." *Svain v. Pitts*, 120 Miss. 578.

The pleadings in this case do not bring the appellees within reach of the court in which they are seeking relief. They did not consummate any trade nor did they have a contract for the sale of the land on any specified terms whatever; they did not produce or procure a purchaser with a binding contract to purchase the land on any terms whatsoever and not having an option to sell the land on any specified terms we submit that it was necessary in order for them to be in a position to recover anything for their services that an actual sale of the land should have been made to the customer presented by them to the owner.

*Magruder, Walker & Martin*, for appellee.

Appellant in the brief of his counsel appears to base his demurrer and his appeal to this court on the proposition that appellees' bill in the lower court does not specify that appellees ever presented and produced to defendant below a buyer to said tract of land who was ready, willing, and able to buy same on the terms and conditions of the contract between the parties. In the first place, this court cannot tell from the pleadings every detail of this contract for the reason that it consisted in part of verbal negotiations as outlined in our bill. In the next place, it is evident that appellant's objection is without merit because he quotes in his brief from our bill the distinct and definite allegation that we did produce and present to appellant a buyer for said tract of land who was ready and

willing to buy the same and to comply in all respects with the terms, conditions and requirements for said sale.

Appellant furthermore undertakes largely, as will be shown on page 4 of his brief, to base his appeal upon the theory that appellee was under obligation to produce a purchaser "tied up to the trade in such a manner to make the agreement enforceable in the courts." How that could be done we are unable to discover. There is no provision of law imposing any such requirement whatever upon a real estate agent or broker.

The terms of the contract between the parties are outlined in the original contract and in the letters constituting a continuance thereof with certain modifications, and certain verbal negotiations.

Appellant's brief insists that appellees had no exclusive option for the sale of this tract of land; but appellant's letters show that it is an absolute definite exclusive contract for such sale until after the date when appellant breached his contract with appellees and refused to execute the same by sale of the land so that appellees could receive their just and legitimate compensation.

Appellant contends that this was a unilateral contract and was revocable at any time. Assuming that it was a unilateral contract, the right of the owner to revoke the contract is limited and it must be revoked before the performance by the broker. In *Kolb v. Land Company*, 74 Miss. 567, cited in appellant's brief, the court says at the bottom of page 569: "If it had obtained a purchaser, even with the assistance of Kolb, ready and willing to buy, then its rights would have been perfect under contract sustained by an executed consideration."

It must be taken as admitted then that appellees had up to October 30, 1919, an exclusive option, that acting under said option they incurred considerable expense in advertising, etc.; that they procured a purchaser ready, able and willing to buy under the terms of the contract, and that appellant repudiated the contract before the option expired.

In *Cook v. Smith*, 119 Miss. 375-383, 80 So. 77, this court held: "It would seem from these cases that the complainant's right of recovery would not depend upon the sufficiency of the memorandum contract, but if he made a sale or procured a buyer ready to take at the named price, that he could recover, though his contract with the principal was merely verbal."

In the case *Smith v. Cauthen*, 98 Miss. 746, 54 So. 844, it is held that though one dollar was stated as the consideration, the real consideration was the advertising of the property and that where the advertising was done the option was irrevocable. So, also, in the case *Sunflower Bank v. Pitts*, 108 Miss. 380, 66 So. 810, it was held that agent in advertising accepted the contract, it was fully executed and conferred upon agent right to recover where land was sold.

We have found no authority, and we think it safe to say that there is no reputable court holding that the owner can employ a broker to sell his land and after the broker has performed all of his duty, can then revoke the contract and refuse to pay the broker. His right to revoke must be exercised before the broker had executed the contract on his part.

The very authorities relied upon by appellant sustain appellee's claim. In the case of *Johnson v. Sutton*, 94 Miss. 544, the court says at page 971: "Where the contract between the broker and his principal specifies the terms on which the land is to be sold, the broker has performed his duty and is entitled to his commission when he produces a purchaser ready, willing and able to buy upon the terms specified."

SYKES, J., delivered the opinion of the court.

The appellees as real estate agents brought suit by attachment in the chancery court for the recovery of two thousand dollars, a commission claimed to be due them by the defendant under a contract whereby they were em-

ployed to sell a plantation belonging to the defendant. A demurrer was interposed to the bill, overruled by the chancellor, and this appeal is here prosecuted to settle the principles of the cause.

The material averments of the bill, briefly stated, are as follows: It alleges the execution of a written option contract for the sale of these lands and the personal property, which contract is made an exhibit to the bill. In this option contract the terms and conditions of the sale are fully stated, and in this contract a commission of 5 per cent. for sale is agreed to be paid by the appellant. The recited consideration of the contract is one dollar, and it is only signed by appellant, and its life was only for one month.

The bill then alleges in substance that this option contract after its expiration was renewed by the appellant by letter, a copy of which letter is made an exhibit to the bill. It is then averred that certain correspondence was had between the parties to this suit relating to the sale of this property and the terms of sale; copies of these letters being made exhibits to the bill. Without setting forth in detail the contents of these letters, suffice it to say that appellant at one time wanted eighty-five dollars an acre as a walkout proposition, or seventy-five dollars an acre for the land. That the appellees in one letter to appellant stated that they thought they could sell the land for sixty-five dollars an acre and wanted to know if appellant would sell for this price and pay them a commission out of this money. In reply to that letter the appellant offered to sell the land for sixty-five dollars net per acre, specifying in this letter, dated October 15, 1919, the terms of sale on which he would make the deal and that he would give possession on December 1st. Again on October 23d, by letter, in response to a telegram from the appellees, the contents of which is not shown in the record, the appellant states:

"I am depending on you to sell the farm. If the cash payment is a difficulty, I am willing to reduce my require-

ment to ten thousand dollars cash. And if there arises any difficulty over the sixteenth section land in a deal on the whole place at my price, I am willing to make any adjustment considered right by those who are competent to say. I had thought that the price named there would not be any difficulty, for I took everything into consideration when I put that price on. However, get an offer and close at price if you can. . . . Go ahead and I shall do nothing before consulting you fully."

The letter then goes on to specify how he would prefer to sell the personal property, etc., but that he prefers a walkout deal. In this letter he also says that he prefers for the appellees to sell his land on a straight commission basis. The letter winds up as follows:

"I would like to see you sell it; and as the matter now stands I think you are entirely free to act—for I guarantee you full protection and shall do nothing until you have had the month out anyway and not thereafter until I have consulted you fully on the matter."

Attached to this letter is an itemized price list for the personal property. The bill alleges that partly by correspondence and partly by verbal negotiations the appellant agreed to pay appellees a commission of 5 per cent., but that it was finally agreed between them to pay a commission of two thousand dollars for a sale of the land. The bill alleges that on the 29th day of October, 1919, the appellees produced and presented to the appellant a buyer for said tract of land, who was ready, able and willing to buy the same and to comply in all respects with the terms and conditions of such sale; that this prospective buyer was ready and willing to execute such contract as should be required of him for the consummation of the sale and purchase of the land and to make the necessary cash payment. It is the contention of the appellant in this case that the terms of sale are not specified in the bill and exhibits thereto, and therefore no commission is recoverable, unless an actual sale has been consummated or the purchaser has entered into a binding contract of sale with the

real estate broker. The allegations of the bill when considered with the exhibits thereto specify the terms and conditions upon which the broker could sell the land. The original terms contained in the option contract were modified by the subsequent letters of the appellant, but from a consideration of all of these exhibits we are of the opinion that the terms upon which the appellees could sell the plantation are therein sufficiently alleged. The bill does not allege which proposition of sale the buyer was willing to accept; that is, whether he was buying the real estate and personal property or only the real estate. The bill, however, alleges that a commission of two thousand dollars was agreed upon between the parties; consequently it would be immaterial whether only the land or the land and personal property both were to be sold. The rule applicable to this case is thus stated in *Johnson v. Sutton*, 94 Miss. 544, 556, 49 So. 970, 971:

"Where the contract between the broker and his principal specifies the terms upon which the land is to be sold, the broker has performed his duty and is entitled to his commissions when he produces a purchaser ready and willing and able to buy upon the terms specified; but where the terms are not specified, and the actual sale is to be made by the principal, . . . his duty is not performed until he produces a purchaser to whom the principal sells."

In this case the terms upon which the land was to be sold are specified in the bill and exhibits thereto, and the brokers performed their part of the contract when they produced a purchaser ready, able, and willing to buy upon the terms specified. The decree of the lower court is affirmed, and the cause is remanded, with leave to the appellant, defendant in the lower court, to answer the bill within thirty days after the mandate of this court reaches the lower court.

*Affirmed and remanded.*

## PARKER v. BOARD OF SUP'RS OF GRENADA COUNTY.

[88 South. 172, No. 21900.]

1. **APPEAL AND ERROR.** *Supreme court may dismiss bill on affirming decree sustaining demurrer.*

When a decree sustaining a demurrer to a bill in equity is affirmed on an appeal to settle the principles of the case, and it does not appear that any amendment can be made to the bill of such character as to entitle the complainant to relief, the cause will not be remanded, but a final decree dismissing the bill will be rendered by the supreme court.

2. **COUNTIES.** *Validity of bond issue cannot be questioned after validation under statute, although issued without authority.*

The validity of bonds issued by a county, municipality, or district is conclusive, and cannot be questioned after they have been confirmed and validated under the provisions of chapter 28, Laws Ex. Sess. 1917, although the county, municipality, or district issuing them was without authority so to do.

APPEAL from chancery court of Grenada county.

HON. J. G. MCGOWEN, Chancellor.

Bill by Harry Parker against the board of supervisors of Grenada county to enjoin a bond issue. A demurrer to the bill was sustained, and plaintiff appeals. Affirmed, and bill dismissed.

*Cowles Horton*, for appellant.

The claim is made that this suit cannot be maintained in any event, even though the bonds were not authorized by law, on account of the validating proceedings under chapter 28, Laws of 1917. This claim and the opinion of the learned court below sustaining this position presents to the court the most important question here involved. This question is important not only in this litigation, but also because it involves the proper construction and meaning and effect of this chapter 28, presented for the first time to this court.

Great reliance is placed by the board on the case of *Bacott v. Board*, 76 So. 765, and the contention is advanced that this case settles the question here involved. This view, we think, is clearly erroneous. There is nothing in the *Bacott* case which would prevent a reversal in the case at bar. The questions there presented were entirely foreign to the ones raised by this record, and the court can stand exactly on that case, and at the same time hold here that the act in question does not authorize the chancery court to validate bonds issued without authority.

In the *Bacott* case, the questions were: (A) Whether those bonds were valid, and the court held that they were; (B) If Laws of 1917 was a valid statute, and the court held that it was. Both of those questions were determined there, and both of them conceded here.

In the *Bacott* case, there was a direct appeal to this court and section 3 of the act was not and could not have been considered in that lawsuit. Not only so but if the court in that case had held that those bonds were not valid by the very act itself, it would have pronounced them so, without regard to the chancellor's holding.

The case at bar presents an entirely different question and that question is this: "Does the chancery decree validating bonds issued without authority become conclusive as against a direct attack that the bonds are valid?"

I shall concede that the decree would be conclusive as to all matters of procedure and all acts *in pais*, about which an estoppel would arise in favor of bond purchasers without notice. I concede further, so far as this suit is concerned, that the decree would be conclusive as against a collateral attack for any reason. I do not concede, however, but on the other hand deny, that the legislature ever intended to delegate legislative authority to the chancellor to cure fundamental defects in the issue itself and authorize *nunc pro tunc*, the issuance of bonds contrary to the legislative will.

I suppose there will be no dispute about the proposition that this attack is direct and not collateral. The question, at any rate, is settled in *McKinney v. Adams*, 95 Miss. 832. That case follows and applies the principles already announced in the cases of *Gerdine v. Duncan*, 59 Miss. 550; *Crawford v. Redus*, 54 Miss. 700; *Sivley v. Summer*, 57 Miss. 712.

But for section 3 of the act, I do not think there would be any disagreement between counsel about the matter at all, in view especially of the fact that under this chapter the chancellor exercises a special and limited, and not a general, jurisdiction. Because of this and because of the rule which is applicable to such courts, it is fair to state that section 3 of the act was inserted so that decrees rendered under the act would stand upon the same basis as decrees of courts in the exercise of their general jurisdiction. This would change the rule with regard to the presumption in favor of such decrees, and this is not true. Then we have the singular situation that decrees rendered under this act cannot be attacked for any ground, directly or otherwise, whether the court had jurisdiction or not, while the decrees and judgment of all other courts, even in the exercise of their general constitutional jurisdiction, would be and are always subject to such attack, as held in the cases cited. No such purpose, we think, can be gathered from the statute that such was the legislative will, if, indeed, the act could stand itself on such construction.

No one, of course, would ever contend that the language of this section was ever intended to apply literally and exactly as the words import. This would make the decree conclusive of the validity of bonds issued in violation of the constitution itself, for which no lawyer could ever contend. *Sykes v. Columbus*, 55 Miss. 116.

If this were not true, then the bonds condemned in the Columbus case, if validated under such proceedings, would have remained valid obligations, not because authorized but merely because of a decree reciting that they were valid

making that decree conclusive to all extent and for all purposes. Our friends on the other side would not, of course, contend that the decree could be so powerful, but the fact that they would not is an admission, to be sure, that the language of the act must be construed in a reasonable manner and in keeping with the legislative policy and the laws of the state.

There is, of course, a great difference between ratification of bonds that are illegal, and a decree adjudging that the bonds are valid, because, in the opinion of the court they are valid under the law. The first is a matter of legislation, pure and simple, and I submit to the court that nowhere in this act do we find any indication of a legislative intent to delegate to the chancellor the power to ratify bonds by curative measures. If his decree is conclusive, it is because of the fact that it is not subject to any attack whatever except by appeal, but he cannot, we submit, validate any bonds under that act unless he does so because he believes them valid.

The ratification of invalid bonds is clearly the function of the legislature, as held by this court in *Vicksburg v. Griffith*, 102 Miss. 1, and repeatedly shown in the following cases from the United States supreme Court: *Bolles v. Brimfield*, 120 U. S. 759; *Bank v. Yankton*, 101 U. S. 129; *Otoe v. Baldwin*, 111 U. S. 1; *Quincy v. Cooke*, 107 U. S. 549; *Read v. Plattsmouth*, 107 U. S. 568; *Jasper Co. v. Ballou*, 103 U. S. 745; *Jonesboro v. R. R. Co.*, 110 U. S. 192.

Assuming that the legislature could confer upon the chancery court the power of legislation, the fact remains that it has not done so under this act, since it is very clear that it was never intended for the court to do anything else than to adjudge. Whether the bonds be valid or not, leaving the decree, as we submit, still open to a direct attack if the court shall act without or beyond the scope of its jurisdiction.

125 Miss.]

Brief for Appellee.

W. M. Mitchell, for appellee.

Granting for the sake of the argument that appellant's objections and contentions are all well taken and sound, and would render this bond issue illegal in the absence of validation; yet we maintain that the necessary legal steps have been duly taken and done to cure all these alleged defects and irregularities, and those bonds have been legally validated and freed from any attack in any court in this state by the decree of the chancery court of Grenada county entered in this matter for their validation under the provisions of chapter 28, Laws of 1917, and that the complaint in this injunction suit, in common with all the world, is bound by said decree and is now estopped by same from attacking validity of said bonds or seeking to prevent their delivery to the purchasers thereof, he having had his day in court, and failed to appear and file his objections or to take an appeal from that decision.

In view of the decision of this court in the case of *Bacot v. Board of Supervisors*, 86 So. 765, sustaining the constitutionality of chapter 28, Laws of 1917, and in view of the competency with which this question is presented by the able brief filed by the distinguished and learned state's bond attorney in this case, I feel that it would be an imposition upon the patience of this court for me to attempt to elaborate upon this point, and I shall therefore submit this matter, with the request that the court, if it can see its way clear to do so, pass upon the question of the validity of the bonds issued by a road district composed of the whole county, but from which one supervisor's district has subsequently to its formation been separated and formed into another separate road district, independently of this validation proceeding. In other words, whether or not the formation of a separate road district within the county under a different law, destroyed the county unit district under chapter 150, Laws of 1910, and amendments, and required that the remaining portion of the county

either split up into beat districts or reorganize under a different act.

*J. B. Harris*, for appellee.

I felt when this court had decided the case of *Bacot v. The Board of Supervisors of Hinds County*, 86 So. 765, that there could be no question as to the meaning of that opinion and as to the scope and the meaning of chapter 28, Acts of 1917, in relation to the validation of bonds.

The transcript of the record of the proceedings of the board was submitted to the state's bond attorney for an opinion as to the validity of the bonds as required and provided by chapter 28, Laws of 1917. (See page 41, transcript). No appeal was taken from any order of the board in reference to the said bonds.

The bond attorney rendered an opinion that the bonds were legal, valid and binding and prepared a decree as required by the act, to be signed by the chancellor in the event no objections were filed. The same were transmitted to the clerk of the chancery court as required by the act of 1917, the cause was docketed and the chancellor notified and requested to fix a day for the hearing. A day was fixed and a notice to the taxpayers was duly published as required by the act, and no objections being filed the chancellor signed the decree drawn by the state's bond attorney validating the bonds, the decree reciting that no objections were filed and that no appeal was taken from any order of the board in relation to the said bonds. There is no question raised that the proceedings in reference to the validation found were not in strict conformity with the statute, Act 1917.

It was expressly decided in the *Bacott* case that "except in so far as the constitution may otherwise provide," the legislature has full power to provide both for the issuance of bonds by municipalities, counties and other public bodies of like character and for validation before their issuance of bonds proposed to be issued by such bodies with-

out authority to do so." In other words, as I understand the Validation Act and the decision of this court in the Bacot case construing it, the bonds issued or proposed to be issued by bodies authorized to issue bonds can be validated under the Act of 1917 to the same extent that they could be authorized or validated by a legislative act although not authorized specially or specifically to issue the particular bond. The court will see that it is not claimed by the appellant in this case that any constitutional provision was violated. The bonds here in question were subject to legislative validation. In the conclusion of his brief counsel says that nothing but a legislative curative act would serve to render the bonds valid, if they could be rendered valid by a curative act they are rendered valid by this validation proceedings.

We elaborately discussed the purpose of this Act and its effect in the brief filed in the case of *Bacot v. The Board of Supervisors of Hinds County*, and refer the court to that brief, and we say here that unless some constitutional restriction can be pointed out the bonds in this case are valid to the same extent that they could be made valid by an act of the legislature. We insist here as we insisted in the Bacot case that these bonds stand as if they had been validated by a legislative act because they are made valid by the very terms of the act which requires the chancellor to sign the decree where no objections are filed within the time prescribed by the act. In other words in a case of this character the bonds are validated by the very terms of the act itself.

Under the validation Act, chapter 28, Acts of 1917, a proceeding is started in the chancery court by the filing of the transcript of the record of the proceedings of the board of supervisors and the opinion of the state's bond attorney given in pursuance of order of the board referring the matter to him. Notice of this proceeding is published and the taxpayers, the parties or anyone of them, are given a day in court; if they choose, to appear and file objections the whole matter can thus be opened up and a judi-

cial investigation had. If no objection is filed, then they are forever precluded from raising objections in any court in this state.

Under the express terms of the Act of 1917, the chancellor was unquestionably required to dissolve the injunction which was granted here and dismiss the bill and unless the Bacot case is overruled and we see no reason but that the decree must be affirmed.

SMITH, C. J., delivered the opinion of the court.

The appellant exhibited an original bill in the court below against the appellee, by which he seeks to enjoin the appellee from issuing bonds of supervisor's districts Nos. 1, 2, 3, and 4, of Grenada county, for the purpose of obtaining funds with which to build roads therein under the provisions of chapters 207 and 276, Laws of 1920.

The bill sets forth, *inter alia*, that the record of the appellee's proceedings in reference to the issuance of the bonds was submitted to and approved by the state bond attorney and a decree prepared by him was entered in the chancery court of Grenada county confirming and validating the bonds under the provisions of chapter 28, Laws of 1917. A demurrer interposed by the appellee to the bill of complaint was sustained, and an appeal to this court was granted to settle the principles of the case.

The alleged defects in the bonds relied on by counsel for the appellant for a reversal of the decree of the court below are: (1) That the county is without authority to issue such bonds at all, for the reason that they are neither county-wide bonds nor bonds of a separate road district; and (2) that the ballots used in the election held for the purpose of obtaining the consent of the qualified electors to the issuance of the bonds did not "have printed thereon a brief statement of the amount and purpose of the proposed bond issue," as required by section 2, chapter 207, Laws 1920.

Neither of these questions is now open for review, because of section 3, chapter 28, Laws Ex. Sess. 1917, which provides that—

“If the chancellor shall enter a decree confirming and validating said bonds and there shall be no appeal by either party from said decree, or if on appeal the supreme court enters its decree confirming and validating said bonds, the validity of said bonds so issued shall be forever conclusive against the county, municipality or district issuing same, and the validity of said bonds shall never be called in question in any court in this state.”

This statute makes the validity of any bonds validated thereunder conclusive, and prevents them from being thereafter assailed, whether the alleged defect therein is the failure of the county, municipality, or district to comply with the provisions of the statute under which the bonds were issued, or is the absence of any authority in the county, municipality, or district to issue bonds in any event of the character of the bonds sought to be assailed or for the purpose for which they were issued.

The legislature has the unquestioned power to authorize the issuance of the bonds here in question; consequently it has the power to provide that they shall be valid, though issued without previous authority in the appellee so to do. *Bacot v. Board of Supervisors*, 86 So. 765.

Whether bonds which the legislature is without power to authorize counties, etc., to issue, can be validated under this statute, is not here involved, and will not be here decided.

The decree of the court below will be affirmed, and since no amendment that could be made to the bill would enable the appellant to maintain his suit the cause will not be remanded, but a final decree dismissing the bill will be rendered here.

*Affirmed, and bill dismissed.*

## GULFPORT &amp; M. C. TRACTION CO. v. CITY OF BILOXI.

[88 South. 172, No. 21767.]

**STREET RAILROADS.** *Street railroad distinguished from commercial railroad for imposition of privilege tax.*

Under section 3874, Code of 1906, as amended by Acts 1920, chapter 104, section 60, which reads as follows: "On each individual, firm or corporation operating a street or interurban car line, on each mile or fraction thereof, thirty dollars—*held*, on the evidence introduced in the case, that the Gulfport & Mississippi Coast Traction Company is a street railroad corporation operating a street or interurban car line, and is not a commercial railroad which could be classified as a third class railroad by the State Railroad Commission, and the city assessment of fifteen dollars per mile on the line in the city is valid under the law.

APPEAL from circuit court of Harrison county.

HON. D. M. GRAHAM, Judge.

Action by the city of Biloxi against the Gulfport & Mississippi Coast Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*White & Ford*, for appellant.

It will be seen at the outset that the city authorities of Biloxi have assumed to exercise the functions of the railroad commission or at least have displaced that body. The question here is whether the defendant company is a street car company or a third class railroad. The lower court adopted the view that as some portion of the company's line was in or near a street, its location controlled instead of its business and character, the propelling power cuts no figure. The New York Central and Pennsylvania and other first class railroads are coming to use electricity to move their finest and fastest trains. It is well known that in various large cities through such roads pass for miles and miles their tracks traverse city

streets. Can it be said that because trains go through streets and are run by electricity, these railroads are street car lines? The electric locomotive resembles, to a large extent, the modern electric interurban car. Great railroads run interurban trains for the convenience of their passengers and to relieve the traffic on their through trains. Does this make them street car companies? Strictly, street car companies haul no freight. The freight carrying nature of the defendant alone takes it out of the category of a street car company. Street car companies are not equipped to haul freight, and especially car load lots.

The supreme court of Florida in 1895, when street cars were primitive, in the case of *Blexham v. Street Railway Company*, 51 A. S. R. 44, decided this question. The above case is exactly in point both on the question of whether the defendant here is a railroad and further to the effect that the authorities whose duty it is to classify such property, have so classed it. We certainly submit the railroad commission's classification is of greater force than that of the city commissioner's of Biloxi, especially when the city authorities act with a purpose of increased revenue in view, adopting the classification creating the greatest revenue to the city.

We cite no further authority on the point than constructions placed on statutes and conditions by governmental agencies and bodies charged with supervision and enforcement of ministerial acts, have the greatest weight with the courts.

The speed of the interurban cars of this company take it out of the class of slow-going street cars. These cars have great speed. The name is not that of a street railroad.

"The word 'railroad' or 'railway' when not qualified by the word 'street' or other expression of similar import, has special reference to what are sometimes denominated commercial railroads." *McLeod v. C. & N. W. R. Co.*, 101 N. W. (Iowa), 77.

The general characteristic of a street railroad is that it is built upon and passed along streets and avenues for the convenience of those moving from place to place thereon. Its fundamental purpose is to accommodate street travel, and not travel to or from points beyond the city's lines. An electric railway company chartered under the general railway act, and authorized to operate between two cities and transport its passengers, mail, express, and other matter, is a commercial railroad and not a street railroad. *City of Aurora v. Elgin A. & S. Traction Co.*, 81 N. E. 544, 547, 227 Ill. 485 (citing *Harvey v. Aurora & G. Ry. Co.*, 51 N. E. 163, 174 Ill. 295; *South Beach Ry. Co. v. Byrnes*, 23 N. E. 486, 119 N. Y. 141; *Diebhold v. Kentucky Traction Co.*, 77 S. W. 674, 117 Ky. 146, 63 L. R. A. 637; *Zehren v. Milwaukee Electric Railway & Light Co.*, 74 N. W. 538, 41 L. R. A. 575, 67 Am. St. Rep. 844; *Rahn Township v. Tamaqua & L. St. Ry.*, 31 Atl. 472, 167 Pa. 84.)

• The law recognizes several kinds of railroads and railroad companies, and recognizes a distinction between a railroad and a street railroad. Statutes using the general term railroad may or may not apply to a street railroad. Where the word railroad is used in a suit to determine whether it is intended to embrace in its meaning a street railroad, the connection in which it is used must be considered. *Sams v. St. Louis & M. R. R. Co.*, 73 S. W. 686, 690, 174 Mo. 53, 61 L. R. A. 475.

4 Words and Phrases (2 Ed.), p. 716. See, also, large number of definitions, 4 Words and Phrases, page 95, et seq.

For a full discussion of the matter and a case where it is held, the use of the road and not the motive power controls. See *Trust Co. v. Hamilton*, 32 C. C. A. (9 Cir.) 46. Railroad and railway under all authorities are synonymous terms. Some of the great trunk line railroads designate themselves railways, for instance, the Southern Railway. So the fact that a carrier is a railway does not prevent it coming under statutory provisions concerning railroads. A dummy line over which cars carrying passengers

exclusively are drawn by small steam engines called dummies, running in the streets of a city, is a railroad. *Katzenberger v. Lawo*, 25 A. S. R. (Tenn.) 681. See, also, 33 Cyc., p. 33-4-5, and notes.

We respectfully submit that the facts of this case show the appellant to be a railroad and not a street car company. If it is liable for the tax sought to be collected by Biloxi, then it is liable also to Gulfport, Pass Christian, Long Beach and Mississippi City through all of which towns the tracks pass. The tax is on the company and not the track, the mileage being only the basis of fixing the tax, and certainly there is no distinct company in all of these various municipalities.

We respectfully submit the lower court was in error in rendering judgment for the city and that the case should be reversed and dismissed.

*Rushing & Guice*, for appellee.

"May it please your honors, it appears that this company was organized under general street railways laws and that the very purpose for which it was created was as expressed in its charter to own, build, construct, maintain, and operate electric light and street railway power systems in the counties of Hancock, Harrison and Jackson, etc."

All of the franchises acquired by appellant company are franchises for a street railway. Learned counsel for the appellant contend that the appellant company is entitled to classification as a third class railroad by reason of the fact that it hauls freight and that its interurban cars make connection with local cars at Biloxi. It appears from the evidence that these interurban cars are in the same class as the local cars within the city limits. They make frequent stops, charge the same fare, whether a patron rides a mile or four hundred yards.

We submit that this custom of the appellant company does not change the main purpose for which the company

was organized. It appears from the business conducted by the company and the manner of conducting the business that the handling of freight is only incidental to its main purpose and that freight is secondary in importance to the carriage of passengers and engaging in the business of a street railway and interurban car line.

It is rather difficult to understand how counsel can contend that this car line is not an interurban car line within the meaning of the chapter 104, Law of 1920. Webster defines "inter" as, between, among, and "urban" as of or belonging to a city or town. The standard dictionary defines the word "interurban" as between cities, and as this line extends from Biloxi on the east through Gulfport and Long Beach to the city of Pass Christian on the west, it certainly is an interurban car line.

The Mississippi legislature passed a law in 1914, being chapter 135, Acts 1914, giving the railroad commission concurrent jurisdiction with municipalities to investigate complaints as to street railway companies or traction lines and to empower the commission to fix charges for transportation on such lines, etc.

We do not concede the constitutionality of this statute when it abrogates franchise rights but if the court should be of the opinion that it is constitutional, then in that event we submit that the extent of the authority given the railroad commission is governed by the provision of this statute and does not include the right to classify.

The legislature of this state has always recognized a distinction between steam railroads and street railways as will be reflected by legislation as to the two classes. The learned author of Hemingway's Code, Hon. WM. HEMINGWAY, placed in his code, chapter 173, which chapter refers only to street railways.

The distinction between street railways and steam railroads is a matter of common knowledge. We submit that section 6573, Hemingway's Code, section 3856, Code of 1906, as amended), was intended by the legislature to ap-

ply only to steam railroads and did not embrace street car lines.

In *Massachusetts Loan Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46, in the circuit court of appeals for the ninth circuit it was said: "If there is any doubt about the true meaning of a term used in a statute, the legislative intent is not to be determined from the particular expression, but from the general legislation of the state concerning the same subject-matter. It may in some connections have a broad and comprehensive meaning, and in others a narrow and limited meaning. The meaning of the word must always depend upon the context and the legislative intent of the statute in which it is used, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view. Admitting, for the sake of argument, that some of the provisions of this section might be applicable to street railways, if they were alluded to or mentioned in the act, it is apparent, from the object, scope, and effect of the previous sections and the language at the head of the provisions of this section, that the legislative mind was directed to the character of roads operated by steam for the purpose of general traffic, of carrying passengers and freight, and herein designated as the railroads of commerce, as distinguished from street railways in the cities and towns for the convenience of passengers only.

In 13 Cyc., p. 1347 it is said:

#### DEFINITION AND NATURE.

"A Definition:—1. Of course street railroad. A street railroad or railway has been defined as a railroad or railway laid down upon roads or streets for the purpose of carrying passengers. Ordinarily the chief characteristics of a street railroad are: That it is constructed upon and passes along streets and highways; that it is usually constructed so as to conform to the grade of the street and so as not to interfere with the use of the street by pedestrians and vehicles; that it is operated for the transportation of

passengers from one point to another in a city or town, or to and from its suburbs; that its cars run at short intervals, at a moderate rate of speed as compared with the speed of commercial railroads, and make frequent stops, particularly at street crossings to take on and leave off passengers; and that primarily its business is confined to the transportation of passengers and not freight. But in the light of development in recent years of the equipment, operation, and use of street railroads, it is not now considered essential that a railroad should strictly adhere to all of these characteristics in order to constitute it a street railroad, and if its primary purpose is to operate upon streets for the transportation of passengers to and from points in a city or town or its suburbs, it is none the less a street railroad because of the fact that it also operates beyond the city limits, or between contiguous towns or cities as an interurban railroad, or for a part of its route upon property other than streets or highways, or even that it transports freight as a part of its business. Whether or not a certain railroad is a street railroad is not determined by the kind of rails it uses in its tracks, or by its position in reference to the surface of the street; or by the fact that its tracks are laid in and confined to the streets of a city; but its character usually depends upon the purpose it fulfills, and if it is designed and used primarily for street passengers and for their reception and discharge along its route, it is a street railroad without regard to the method of construction or operation, the kind of motive power used, whether animal or mechanical, or whether it is constructed at grade or upon an overhead structure as in the case of an elevated railroad or with cuts and fills, or is beneath the surface as in the case of a subway."

It is difficult, in some cases, owing to the fact that street railway companies have been gradually extending the sphere and character of their operations, to determine in what class a particular road belongs, but it does not obliterate the main purpose and functions of the two classes.

*State v. Duluth Gas Co.*, 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63.

A road is a street railroad where large double track cars are operated over it through contiguous towns; nearly all the lines are within the corporate limits; no interstate cars are run over the line involved; the company is permitted, by its franchise, to carry mail, persons and property under Laws 1920, p. 461, c. 207, relating to street railways; passengers are carried only; the company was organized under general street railways laws and uses electricity, as motive power; the lines were built throughout on public streets and highways; the cars stop at all street crossings and between such crossings where the distance is great or convenience of passengers requires it, to take on or let off passengers; the tracks are maintained on a level with the streets and where five cent fares can be charged from any point on the line to any other point within the state, etc. *Michigan Central Ry. Co. v. Hammon West and E. C. Electric Ry. Co.*, 83 N. E. 650.

(Cal. 1911.) "A street railway is defined as a railroad constructed upon the surface of the public street in towns or cities; a tramway and railroad on the surface of the streets for the convenience of passengers; a surface railroad as in a city and is one constructed and operated on and along the streets of a city or town or to and from its suburbs. *Summellan v. Pacific Electric Ry. Co.*, 115 Pac. 320."

Whether a railway is a street railway does not depend solely upon the motive power but other features are to be considered, as the location and method of construction of the track, the manner of the operation of the cars and the general purpose of the enterprise. *Id.*

(Ind. 1910.) A corporation empowered to construct, equip, and operate a street and interurban railway was none the less a street and interurban railway corporation because it was also authorized to promote plans for the creation and distribution of electricity and other heat, light and power. *F. W. Cook Inc. Co. v. Evansville Ter-*

*minal Ry. Co.*, 93 N. E. 279, *Reitze v. Same*, Id. 283.

"That an electric railway carries mail, persons and property would not render it a commercial and not a street railway. *Galveston H. & C. Ry. Co. v. Houston Electric Co.*, 122 S. W. 287."

A street railroad and an electric railroad designed to run beyond the municipal limits may be incorporated under the same charter. *Shreveport Traction Co. v. Kansas City, S. & G. Ry. Co.*, 44 So. 457, 119 La. 759;

(Md. 1907.) An electric railway is none the less a street railway within the city limits under ordinances authorizing it to use certain streets, etc., because when it leaves the city it becomes an interurban railway. *Jeffers v. City of Annapolis*, 86 A. 361, Am. Dig., Col. 3.

"The statute as to taxation of railroads has never been applied to the taxation of street railroads. 52 N. E. 192, *Masselleon Bridge Co. v. Camurie Icm. Co.*"

In the case of *Louisville & P. R. Co. v. Louisville City R. R. Co.*, 2 Div. 175, it was held that a street railway in both its technical and popular sense is not a railroad. This is approved by Elliott, Roads & Steam 557, and by Ror. R. R. 1422. Extracts from opinion in *Bridge Co. v. Iron Co.*, 52 N. E. 192. Street and commercial railroads defined and distinction stated. *Hatzell v. Alton Grante & St. Louis Traction Co.*, 104 N. E. 1080, 236 Ill. 205.

In conclusion we submit that the judgment of the lower court should be affirmed and the appellant required to pay the proper privilege license on the business conducted by it and we submit the evidence shows the appellant to be engaged in the business of operating a street railway.

HOLDEN, J., delivered the opinion of the court.

This is a suit by the city of Biloxi against the Gulfport & Mississippi Coast Traction Company to recover a privilege tax of one hundred twenty dollars upon eight miles of street car line operated in Biloxi. The appellant street railroad defended on the ground that it is a third class

railroad, and as such was due only forty dollars; or five dollars per mile, on the eight miles of its line in the appellee city. From a judgment in favor of the city the street railroad appeals.

The city seeks to recover under section 3874, Code of 1906, as amended by Acts 1920, chapter 104, section 60, which reads as follows:

"Street Cars.—On each individual, firm or corporation operating a street or interurban car line, on each mile or fraction thereof, thirty dollars."

The appellant street railroad contended that it was liable for the privilege tax under section 6573, Hemingway's Code, as a railroad of the third class, in which class it had been placed by the State Railroad Commission; that this tax is ten dollars per mile to the state, and as the city of Biloxi levies a privilege tax of fifty per cent. of the state tax, it was liable for only five dollars per mile.

At the trial, which was heard by the judge without a jury, proof was offered by the city and the street railroad as to the character of the business carried on by the street railroad, its franchise in the city, its purposes and operation. There is testimony showing that the street railroad had a car which it used in transporting freight on its city street line and interurban line. Its city franchise showed it to be a street railroad; its operation, generally and primarily, was in transporting passengers from one part of the city to the other, and also running part of its cars in interurban passenger traffic. The tracks in the city are laid in the street, and even with the surface thereof, and its primary business is that of a street railroad.

We consider it unnecessary to set out the evidence in detail, showing that the appellant was a street railroad "corporation operating a street or interurban car line," but deem it sufficient to say that the proof is overwhelming, if not conclusive, that the appellant corporation operated a street railroad and interurban car line. Therefore it is not a commercial railroad which could be classified as a third class railroad by the State Railroad Commis-

sion. There is but scant room for argument to the contrary.

The city assessment of fifteen dollars per mile on the eight miles in the city, which is fifty per cent. of the state tax, is correct and valid.

The judgment of the lower court is affirmed.

*Affirmed.*

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YAZOO & M. V. R. CO. v. NORMAN.

[88 South. 174, No. 20996.]

*CARRIERS. Initial carrier's liability ends on delivery to interstate point designated in its bill of lading.*

When the initial carrier issues the bill of lading, by the terms of which it undertakes to deliver the interstate shipment at a certain place, its contract is performed when it delivers the shipment in good order at the designated place, and it is not liable, under the Carmack Amendment (U. S. Comp. St., sections 8604-a, 8604aa), for damage to the shipment while it is being transported by another railroad company to some other point under a bill of lading issued by the other company to the owner of the property.

APPEAL from circuit court of Copiah county.

Action by R. S. Norman against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and action dismissed.

*F. M. West*, for appellant.

The rights and liabilities of shippers and carriers respecting property shipped by freight from one state to another are to be governed exclusively by Federal Laws. *M. K. & T. R. R. Co. v. Harriman*, 227 U. S. 657, 57 Law Ed. 690; *A. T. & S. F. R. R. Co. v. Robinson*, 233 U. S. 173, 58 Law Ed. 901; *A. T. & S. F. R. R. Co. v. Moore*, 233 U. S. 182, 58 Law Ed. 906; *G. F. & A. R. R. Co. v. Blish*

*Milling Co.*, 241 U. S. 190, 60 Law Ed. 948; *C. N. O. & T. P. R. R. Co. v. Rankin*, 241 U. S. 319, 60 Law Ed. 1022; *So. Ry. Co. v. North State Ct. Co.*, 64 So. (Miss.) 965; *Jones v. Express Co.*, 61 So. (Miss.) 165; *I. C. R. R. Co. v. Davis*, 72 So. (Miss.) 874.

Many other authorities could be cited, but the above suffice. The validity and interpretation of the contract for the interstate shipment of property must be determined under the laws of the United States, and the decisions of the Federal courts thereunder. *McElwain v. St. L. & S. F. R. R. Co.*, 176 Mo. App. 379, 158 S. W. 464; *Smith v. St. L. S. W. R. R. Co.*, 186 Mo. App. 401, 171 S. W. 635; *Kent v. C. B. & Q. R. R. Co.*, 189 Mo. App. 424, 176 S. W. 1105; *Washington Horse Ex. v. L. & N. R. R. Co.*, 87 S. E. (N. C.) 841; *United Lead Co. v. Lehigh Val. R. R. Co.*, 141 N. Y. Supp. 310; *Davenport v. C. & O. R. R. Co.*, 149 N. Y. Supp. 865; *C. R. I. & P. Ry. v. Whaley*, 177 S. W. (Tex.) 453; *Hovey v. Tankersly*, 177 S. W. (Tex.) 153; *I. C. R. R. Co. v. Davis*, *supra*. Additional authorities are available, but the above are sufficient.

The federal laws, and the decisions of the supreme court of the United States construing them, afford an exclusive rule for determining controversies in state courts pertaining to interstate shipments. *Amer. Silver Mfg. Co. v. Wabash R. Co.*, 174 Mo. App. 184, 156 S. W. 830; *Collins v. D. & G. R. R. Co.*, 181 Mo. App. 213, 167 S. W. 1178; *Hamilton v. C. & A. R. R. Co.*, 177 Mo. App. 145, 164 S. W. 248; *Johnson v. M. P. R. R. Co.*, 187 S. W. (Mo.) 282; *So. Ry. Co. v. North State Ct. Co.*, 64 So. (Miss.) 965; *Jones v. Express Co.*, 61 So. (Miss.) 165; *I. C. R. R. Co. v. Rogers & Hurdle*, 116 Miss. 99; *I. C. R. R. Co. v. Davis*, *supra*. Further citations are unnecessary.

*Robt. B. Mayes and Clayton D. Potter*, for appellee.

Our contention is that the shipment was a through shipment within the meaning of the federal statute. That is the sole question in this case, and not an authority cited

by counsel for appellant contravenes this contention as we will undertake to convince the court when we analyze their authorities. We want first to present our case on our authorities, before answering the other authorities of counsel for appellant.

In Volume 1, Moore on Carriers, section 24, page 242. the rule is laid down that the owner or shipper of goods may change their destination, and substitute a different place of delivery at any time before final destination is reached and the carriers obligation is not fulfilled until the place of final destination is reached and the goods placed for delivery. This was not done when this diversion order was given. Counsel for appellant present a very ingenious argument to the court, and we compliment them for their skill and resourcefulness in trying to find a defense to this case in the Federal statutes by straining what is manifestly the true intent of the statute and its clear definition when it uses the words "transported on a through bill of lading."

It does not mean that at the time the bill of lading is issued that it must contain the final destination of the shipment for if it did it would destroy much of the benefit to be derived from the Federal law in allowing suits against the initial carriers, and would revolutionize the well known and relied upon custom of railroads to allow diversion en route. This is not only a custom, but it is a legal right, and of course the Federal statutes follow and preserve every legal right the shippers had before its passage. Without the right to divert, the perishable food industry is destroyed. Now what does the Federal statute mean when it says the initial carrier may be sued for damages to goods injured when transported on a through bill of lading? In looking for a definition we must resort to railroad methods to some extent for aiding us to understand the meaning of the statute.

In the case of *Hill v. Wadley*, 128 Georgia 713, the Georgia court has given us a definition of what is meant by a through shipment. It says: "Freight is designated as

local or through. As the terms are ordinarily employed, a shipment between points on the same line of road is local freight; through freight is that which comes to a railroad company from some other road, or which starts at some point on one line, but in order to reach its destination is turned over to a connecting carrier. It requires the service of two or more railways." This is an accurate and clear definition of what is meant in the Federal statute by a through bill of lading. "It is any bill of lading carrying the goods over a connecting carrier's line, when the shipment is an interstate shipment." The Federal statute preserves all the rights that the shipper had before its passage, and adds more to it.

The case of *Baltimore & Ohio R. R. Co. v. Montgomery*, 90 S. E. 740, is a case directly in point and we think decides this case. In the above case a carload of peaches was delivered to the Baltimore & Ohio R. R. at Moorefield, West Virginia, consigned to Richmond, Virginia. This car was delivered by the Baltimore & Ohio R. R. Co. to the Richmond, Fredericksburg & Potomac Railroad Company, and by them carried to Richmond where the contents of the car was inspected by the consignees and found to be in good condition. On the same date this car was delivered to the Atlantic Coast Line, and reshipped to Atlanta, Georgia, upon the original bill of lading issued by the Baltimore & Ohio Railroad Company. The bill of lading issued by the Baltimore & Ohio Railroad Company was the only bill of lading issued during the transit of the shipment. The court said: "The Federal Interstate Commerce Act, as amended, expressly provides that the initial carrier shall be liable for any loss or damage caused by it or any common carrier to which such property may be delivered, or over whose lines such property may pass, etc.

"When the defendant, the initial carrier, issued the bill of lading it was with the knowledge that the law gave the right to change the destination, and with the knowledge that the law put upon it, the initial carrier, the burden

of paying for damages to the shipment, if any was sustained, whether the damage was caused by the defendant or a connecting carrier. The destination was changed from Richmond to Atlanta by the consignees. The shipment was carried from the point of origin—Moorefield, West Virginia—to Atlanta, Georgia, under the contract, the bill of lading issued by the defendant company, and the shipment moved under a through rate of freight from the point of origin to Atlanta, the final destination, as appears from the freight bill. If the defendant, or its connection, had delivered the shipment at Richmond, demanded a surrender of its bill of lading, then collected the freight charges due it, and thereafter a new bill of lading had been issued for the shipment from Richmond to Atlanta, then there would have been a new shipment and the railroad issuing the second bill of lading to Richmond would have been the initial carrier of the shipment from Richmond to Atlanta.” See, also, the case of *Myers v. Norfolk & Southern R. R. Co.*, 88 S. E. 149.

The bill of lading in this case reads over all the roads, the initial roads and all connecting roads. In the *Parker-Bell Lumber Company* case, in the new bill of lading, no road names appeared except the new lines. The shipment was made from Kankakee to Palisades Park. It was in truth a new shipment and as the name of the initial carrier did not appear in this new contract, it could not be sued as such because it was not an initial carrier in this shipment. The two cases are widely different. The same distinction exists in the case of *Fred Henderson & Walters v. A. C. L. R. Co.*, 76 So. 305.

In both of the above cases the contract of shipment had been fulfilled. It was complete. In the case at bar no new bill of lading was issued at any time. An exchange bill of lading was issued, but each time it carried the name of the initial carrier in the face of it, and but one freight bill was used to collect the entire freight for all the roads, and only a through rate was charged. Counsel for appellant contend that this was a new bill of lading. The facts

do not warrant this contention. It was not a new bill of lading, or a new shipment, as was the case in the two above cases. "New" means, according to the most approved definition, original, independent of, something not heretofore used or discovered. "Exchange" means something to take the place of, not new, and the later bills of lading were mere exchange bills of lading, carrying all that went before and adding a little more. When the court refers to the bills of lading attached to the record it will see that all are made on the same form and that conditions upon each are the same. They are all marked as follows, viz.: "Standard form of straight bill of lading, approved by the interstate commerce commission by order No. 787 of June 27, 1908."

No matter which of the roads dealt with this property, the form and conditions on the back are identical. When an exchange bill of lading was issued it had stamped on the face of it: "This bill of lading issued in exchange for bill of lading issued at Hazelhurst, Mississippi, on the 29th day of June, 1917, by the I. C. Railroad." In the place designated in the exchange bill of lading for the route appears the only two routes used, to-wit: "I. C. & Pennsylvania Lines."

When the goods arrived, the full freight for the entire trip was collected on the same freight bill. While we illustrate by one car diverted, all were the same. Manifestly this was a through shipment within the Federal Act.

Just here it might be well for us to analyze the authorities cited by counsel to show that they are not in point on the question involved. On page 19 of Counsel's brief he cites the following cases: *A. C. L. R. R. Company v. Riverside Mills*, 55 L. Ed. (U. S.) 167; *N. P. R. R. Company v. Wall*, 60 L. Ed. (U. S.) 905; *Adams Express Company v. Croinger*, 57 L. Ed. (U. S.) 314; *K. C. S. R. R. Company v. Carl*, 57 L. Ed. (U. S.) 683; *G. F. & A. R. Co. v. Blish Milling Co.*, 60 L. Ed. (U. S.) 948; *St. L., I. M. & S. R. Co. v. Starbird*, 51 L. Ed. (U. S.) 917; *M. L. & T. R. R. Co. v. Ward*, 61 L. Ed. (U. S.) 1213; *T. & P. R. Co.*

v. *Leatherwood*, 63 L. Ed. (U. S.) 620; 17 U. S. Adv. Ops., page 620. Not one of these cases bear upon any question involved here. We will take up each case.

In the case of the *A. C. L. R. R. Co. v. Riverside Mills*, 55 L. Ed. 167, the main question involved was as to the constitutionality of the act of Congress making the initial carrier liable to suit for damages occurring beyond its own line. The court will find the question in the case stated on page 170. The question was simply this: The A. C. L. R. R. Company, ignoring the act of Congress making the initial carrier liable for damages occurring on a connecting carrier, placed in its bill of lading a condition that "no carrier shall be liable for loss or damages not occurring on its portion of the route." This stipulation was in the face of the Federal statute, and when sued as initial carriers the railroad undertook to defend under that clause, contending that the statute was unconstitutional because it deprived the carrier of the right to make a just and reasonable contract; and because in casting primary liability upon the initial carrier, it deprived it of its property without due process of law. The court sustained the statute. This is all that the above first cited case determined. No question was involved such as the one found in this case. However, as throwing light on the purpose of this statute and the liability to be indulged in its construction, the court quoted with approval a speech made by Judge RICHARDSON, a Congressman from Alabama, at the time the bill was passed and stating its purpose. The quotation is as follows: "One of the great complaints of the railroads has been—and I think a reasonably just and fair complaint—that when a man made a shipment, say, from Washington, for instance, to San Francisco, California, and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute a suit. The result was that he had to settle his damage at what he could get. What have we done? We have made the initial carrier, the carrier that takes and receives the shipment, responsible for the loss of the article in the way of

damages. We save the shipper from going to California or some distant place to institute the suit."

The above shows the purpose of the statute and a broad effect should be given the statute. Why should we be sent to Pennsylvania to litigate this case? For above quotation see 55 L. Ed. 180.

The next case cited by counsel on page 19 is the case of *N. P. R. R. Co. v. Wall*, 60 L. Ed. 905. Not a question decided in the case just named appertains in any way to the questions involved in the case now on trial. The above case only dealt with whether a notice of damage given by the shipper to the connecting carrier was a sufficient compliance with the stipulation in a bill of lading issued by the initial carrier requiring notice of damage to be given to the initial carrier's officers or station agents, and the court held that it was sufficient. The whole case deals with what is a sufficient compliance with a requirement that notice of damage shall be given. On what point in this case does counsel for appellant claim that the last case named has any bearing?

The next case cited by counsel is the *Croninger Case*, 57 L. Ed. 314. This case is absolutely without merit as authority here.

The next case is the case of *K. C. S. R. R. Company v. Carl*, 57 L. Ed. 683. All that this case holds is that a connecting carrier may have the benefit of any and all lawful limitations that the initial carrier may place in the bill of lading.

The court pointedly states the two questions involved on page 951. The court says there are only two questions presented: 1st. Is the plaintiff's exclusive remedy against the initial carrier? 2nd. Is the case barred by failure to follow out the provision in reference to filing notice of claim for loss or damage?

How are we helped in solving the questions in this case by anything said in the *Milling Company case*, *supra*.

The next case relied upon is the case of *St. L., I. M. & S. R. R. Company v. Starbird*, 61 L. Ed. 917. Let us see if

that case is helpful? An examination of the case shows that the sole question involved was as to the validity of a stipulation in a bill of lading to the effect that in the shipment of a carload of peaches, a claim for damages must be reported to the terminal carrier in writing thirty-six hours after delivery. The court upheld the stipulation. How does this help in this case?

The next case relied upon is the case of the *M. K. & T. R. R. Co. v. Ward*, 61 L. Ed. 1213. What is this case? The facts of this case show that Ward delivered to the Houston & Texas a car of cattle consigned to Winona, Oklahoma, over its own line and that of two connecting carriers. The Houston Company issued its bill of lading in the form of a live stock contract in common use. The first of the connecting carriers on receiving the cattle, issued a new bill of lading and ignored the original one. The court says in its opinion that the record is silent as to the circumstances under which the second bill of lading was executed. The stock was damaged and Ward brought suit against all the carriers involved. Separate defenses were interposed predicate on the different bills of lading, and the court merely held that the terms of the original bill of lading governed the entire transportation. That is all the last case holds. How does that conflict with our contention? The exchange bill of lading in the case on trial is identical with the original in all of its terms and there is no contention that it is not.

Now the next case is the case of *I. & P. R. R. Company v. Leatherwood*, 63 L. Ed. 620; U. S. Adv. Op., Volume 17, page 620. What is this case? It merely holds that connecting carriers cannot be prevented by estoppel from relying upon provisions in the bill of lading issued by the initial carrier in conformity to the Interstate Commerce Act.

In all the authorities so far cited by counsel not one touches upon any point involved in this case.

COOK, J., delivered the opinion of the court.

Omitting all nonessentials, this record shows that on June 9, 1917, the appellant railroad company issued its bill of lading and delivered it to the appellee, R. S. Norman. By the terms of this bill of lading the appellee contracted to carry a certain carload of green tomatoes to Effingham, Ill. The record shows that the carload of tomatoes were carried safely to Effingham. In other words, the contract made by the Yazoo & Mississippi Valley Railroad Company was faithfully performed. Other bills of lading were issued by other railroad companies to the appellee at its request, and with these bills of lading we have no concern for the manifest reason that the appellant had nothing to do with same.

The briefs in this case have taken a wide range, and in our opinion, while they are interesting, much has been said about cases not made by the record. It goes without saying that the statutes of the United States and the interpretation of same by the courts of the United States are controlling. The simple and only question presented by the record is, Did the appellant comply with its contract. There is no conflict in the evidence upon that point. The appellant did carry the shipment to the destination named in the contract, and did deliver the same to connecting carriers selected by the appellee. The appellant was responsible for the shipment from Utica, Miss., to Effingham, Ill., and no further. The appellee made contract with other carriers to deliver the shipment to points further east in the state of Pennsylvania, and the damage claimed in this action occurred while the tomatoes were in the possession of agencies selected by him.

The defendant below was entitled to a peremptory instruction directing the jury to find for the defendant.

*Reversed and dismissed.*

## A. GOLETTI, INC., v. ANDREW GRAY CO.

[88 South. 175, No. 21756.]

SUNDAY. *Sunday contract void, but recovery may be had for quantum valebat where property accepted on subsequent secular day.*

A written contract executed on Sunday is void, and no recovery can be had thereon. but recovery may be had for *quantum valebat* in an action of *assumpsit* upon an implied promise to pay for property which was accepted and converted upon a subsequent secular day.

APPEAL from circuit court of Harrison county.

HON. D. M. GRAHAM, Chancellor.

Action by A. Goletti, Incorporated, against the Andrew Gray Company. From a judgment of dismissal; plaintiff appeals. Reversed and remanded.

*White & Ford*, for appellant.

In the case before your Honors the amount now claimed is not the consideration for any Sunday contract but the amount due for the reasonable value of the lumber inspected and accepted, taken and used by appellee on a secular day. It bears no relation to any contract. In the Kountz case nothing was done to the completion of the contract on a secular day while in the case at bar the entire thing was done on a secular day. The Kountz case condemns as unlawful the thing done on Sunday. We admit the contract was unlawful, but there was nothing unlawful or even improper in appellee's inspecting lumber and taking it on a secular day. In the Kountz case it is held where the contract has its inception on Sunday, and is completed some other day the contract is not illegal. We have shown there was no contract until inspection and the demurrer to the replication admits it, but we do not even have to rely on that proposition of law, because we seek nothing under the void Sunday contract.

Counsel cite *McKee v. Jones*, 67 Miss. 405, but neither in the statement of facts nor opinion are we able to find any holding such as is attributed to it by counsel. Counsel's statement of what was held, does not affect this case, but the only two propositions decided in the McKee case were that the Sunday law was not involved because the trade was in Louisiana and that the court ruled erroneously on a question of warranty.

Counsel then lay down the rule that this court holds trover and attachment do not lie and there can be no recovery on a *quantum valebat* but cites no cases to support the statement.

Counsel rely on *Strouse v. Lanctot*, 27 So. 606. The suit was on the Sunday contract and the contract was relied on for recovery. Without the contract no recovery was sought. This court held the contract unenforceable but if the suit had been one for the value of clothes delivered on a week day the decision would have been different. In the Strouse case the point is clearly made that the recovery is sought on the void contract. We have never contended for such a point.

Appellee's only criticism of the authorities cited by appellant in original brief is that they are cases from other jurisdictions. We submit such cases ought to be helpful if not persuasive in the absence of a case in point from Mississippi. We don't rely on any question of ratification, as counsel seem to think. The cases we cite are cases where the facts are similar and we do not think the court will be misled by counsels seeking to inject an immaterial issue in the case.

Counsel finally says he does not dispute our law and we certainly admit every case he cites is the law, so then we leave it to the court to decide whose cases fit the facts of the case at bar.

Counsel make the statement that delivery of the lumber was not necessary. Gray's agent had to inspect it before it was ever shipped and it was inspected and shipped to Gulfport, the place of delivery, on a secular

day and then taken and converted by Gray on another secular day. The replication is the controlling pleading and we ask the court to read it carefully.

Counsel admit the void portions of a contract can be separated from the good and the good portions enforced. *Jones v. Brantley*, and *Bowers v. Jones*, criticised by counsel both so hold. Counsel ought to be familiar with the *Bowers* case as they tried it and raised the same defense in that case as here.

So under the rule of separating the good from the bad and proceeding on the good, we can travel and in fact stand alone without the contract. Appellee speaks about violation of Holy Writ. It seems to us appellee ought to be ashamed to mention Holy Writ. We take it he is in favor of some of the Ten Commandments and against others and reserves the right to make his choice as circumstances arise.

It is very true the statute is not passed for the benefit of a defendant. We all know its purposes. Looking at the record herein, has anything been done violating the letter or spirit of the statute? Why should not this lumber have been inspected and accepted on a week day just as any other?

If the parties are left where they are found, then we say they are in the position of appellee owing appellant for his lumber converted to the use of appellee. He couldn't take the lumber pursuant to a contract because there was no contract, it was void; then he took it under circumstances rendering him liable therefor.

We trust this court will write the history of this case on the pages of its reports to serve as a warning for the unwary and that it will speedily reverse the case that justice may be done.

*Mize & Mize*, for appellee.

Counsel for appellant say that it is not a suit on any contract whatever, but is plainly a suit for the value of

twenty-two thousand feet of lumber; yet he overlooks a part of the pleadings which is part of the case, to-wit; appellee's plea which avers that the suit is for the price of certain lumber of which lumber each and every particle was delivered in pursuance of a contract that was wholly made on Sunday, and this the appellant did not deny.

There was no inspection necessary to the completion of the sale; the sale under this contract, if executed on a secular day, was complete when the contract was signed.

Counsel for appellant further takes the position that no contract was ever made; that it was a void sale and that the contract was a nullity. This is true; yet every bit of the lumber for the price of which this suit was brought was delivered under this void contract, and one that was not only void but prohibited by the statute. The same contention was made in the case of *Block v. McMurray*, 56 Miss. 217.

The case of *Miller v. Lynch*, 38 Miss. 344, was a case where on Sunday the parties met and went over their differences and found that one owed the other a certain amount and a note was given on that day for the balance of indebtedness in a transaction that took place before that day and also for a wagon that had been sold on a secular day; and the court held that the note was void and unenforceable. To the same effect is the case of *Kuntz v. Price*, 40 Miss. 341. This case is almost on all fours with the present case.

In the instant case the price and amount of the lumber was agreed upon on a Sunday and the contract embodying the same was signed, executed and delivered on Sunday; then the seller of the lumber thereafter delivered it to the buyer on a secular day, which amounted to an attempted ratification by the seller of the lumber, but the appellee, the buyer of the lumber does not agree to the attempted ratification of the contract and declines to pay; and the contract, having been wholly made, signed and delivered on Sunday, is absolutely void and the appellant is not entitled to enforce it in a suit at law.

In the case of *Block v. McMurray*, 56 Miss.-217, cited *supra*, the court held that an action of trover would not lie for the value of the horse. In that case, McMurray, instead of suing on the contract made on Sunday to recover the price of the animal he had sold and delivered on Sunday, attempted to bring an action of trover; just as, in the instant case instead of declaring on the contract, the appellant is attempting to evade his attempted contract and bring an action *quantum valebat*; but the court, in the McMurray case held that the statute could not be evaded in any such manner.

To the same effect is the case of *McKee v. Jones*, 67 Miss. 405, holding that the creditor of the seller who sells property on Sunday cannot levy an attachment on the property on the ground that the title to the property sold on Sunday did not pass; that the law is absolutely non-action.

So this court holds that trover does not lie and attachment does not lie; and there is no coming in on the ground of *quantum valebat* and attempting to evade the penalty of the statute.

The case that is right on all fours with the instant case is a case that went up from Monroe County. *Strouse et al. v. Lanctot*, 27 So. 606. It is well settled that it can be shown that a contract, though it bears a different date, was entered into on Sunday, 37 Cyc., p. 572.

The appellant cites a number of cases from other states, none of which, we respectfully submit, are in point.

The first case cited in counsel's brief is a Tennessee case, where the terms of the agreement were subject to the purchaser's inspection of the oxen and satisfaction with them, and the inspection and approval of the oxen took place on a secular day. This was a valid contract because the contract was not completed till a secular day. Not so in the instant case.

The next case is an Iowa case, where the order was taken on Sunday but the delivery and acceptance thereof occurred on a secular day; and, also, Iowa holds that a

contract made on Sunday can be ratified on a secular day, while our court, in the *Kuntz case*, 40 Miss., *supra*, held that a Sunday transaction cannot be ratified.

37 Cyc. p. 565, gives both lines of authorities, one line holding that a Sunday contract can be ratified on a secular day and the other holding that it cannot be ratified. Mississippi holds that it cannot be ratified but Iowa holds that it can be ratified, as shown by a number of cases cited in the footnote, at p. 566 of the above volume of Cyc.

The next case appellant cites in its brief is a Pennsylvania case. Pennsylvania, like Iowa, holds that a Sunday contract may be ratified on a secular day, and therefore in the Pennsylvania case appellant cites, when two mules were accepted on Monday in pursuance of a contract entered into on Sunday, there was a ratification of the Sunday contract; but, under the holding of our court, this case is not in point.

The same thing is true of the next case cited by the appellant, a Missouri case. Missouri holds that a contract made on Sunday can be ratified on a secular day. See note at p. 566, 37 Cyc., *supra*.

The next case, a New Hampshire case, is not in point for the reason that the offer made on Sunday was not accepted until Monday. That would be the law in this state. Negotiations begun on Sunday but no contract entered into on that date, and then, afterwards on a secular day, a contract based on these negotiations entered into, would be a good contract in this state. So the New Hampshire case was not in point.

The same is true of the Delaware case cited by counsel. A note made on Sunday was not delivered until a week day; and of course delivery is an essential part of such instrument. But, in the instant case, the contract was signed, delivered and in every way completed on Sunday. The same is true of counsel's citations from Ruling Case Law. There is no dispute about the law he cites, but it is not applicable to this case because here everything was complete on Sunday.

The next citation in appellant's brief from Ruling Case Law is not applicable, because, under appellee's plea in this case, which is not denied by appellant's replication the cause of action between appellant and appellee cannot be disconnected from the illegal act of making the contract on Sunday, as each and every particle of the lumber for the price of which appellant is suing was delivered under and because of this contract that was entered into and completed on Sunday. Had it not been for this attempted contract which was entered into on Sunday, this lumber would never have been delivered by appellant to appellee, according to the allegations of appellee's special plea, which allegations are not denied.

Therefore, appellants cause of action is inseparably connected with the void and illegal contract; and this the appellant cannot escape. The case of *Jones v. Brantley* and *Bowers v. Jones*, cited by counsel, are not in point in this case.

In the *Jones v. Brantley* case, the court held that it was a question for the jury whether or not the contract was entered into on a secular day or on Sunday. Jones testified it was not entered into on Sunday and that he stayed around his office ten days waiting for Brantley and Brantley's partners and that the contract was entered into on a secular day.

The same is true of the case of *Bowers v. Jones*. It is not in point, this court holding that the letters written by Mrs. Jones on a secular day to Mr. Bowers constitute a retainer by Mrs. Jones of his services.

The gist of this case is simply this: "The parties to this suit admit that they entered into this contract on Sunday as fully and completely as could be done; began, signed, executed and delivered the contract on Sunday. If this had been done on a secular day, it would have been a perfectly good contract."

Thereafter, a part of the lumber specified in the contract is delivered to the appellee in pursuance of this void contract, not only void contract but a prohibited

contract by the statute, on the ground of public policy. The courts have repeatedly held that this statute is not passed for the benefit of any defendant and is not enforced for the benefit of any defendant, and in some instances probably works hardships on some plaintiffs, yet, for the sake of public policy, the law will leave parties who knowingly violate the Sabbath law in whatever position they have thereby placed themselves. The appellant has placed himself in this position while knowingly violating the Sabbath law, not only the statute law but Holy Writ; and, when parties are guilty of that, then the courts, for the sake of public policy, leave the parties just where they have placed themselves and will not aid either party.

If the appellant can recover in this case, under the above pleadings, then the Sabbath law, so far as it prohibits contracts being entered into on Sunday, would be useless, because then all of the wholesale dealers could keep open house on Sunday as on a secular day, and then fulfill these contracts on a secular day and recover. Such is not the policy of our law; but the policy of our law is and has ever been since Mississippi was a state, that the courts will not lend their aid to those who are guilty of violating the Sabbath law.

We therefore respectfully submit that this case should be affirmed.

HOLDEN, J., delivered the opinion of the court.

This is a suit by the appellant to recover the value of a quantity of lumber delivered to the appellee, who accepted and converted it to its own use. The pleadings show the action of the plaintiff to be one of *assumpsit*, on an implied promise to pay, in *quantum valebat*. The defendant below pleaded a denial of liability on the ground that the contract of sale of the lumber was executed on Sunday, and for that reason was void. To this plea of a Sunday contract the plaintiff replied that the lumber was delivered to and accepted by the appellee on a secular

day, converted by the appellee to its own use, and that, by such acceptance and conversion on a day other than Sunday, appellee then and there assumed and obligated itself to pay to plaintiff the reasonable value of the lumber. A demurrer to this replication was sustained by the court, the suit dismissed, from which judgment this appeal is prosecuted.

The question presented for our decision is whether or not the fact that the written contract between the parties was wholly executed on Sunday, but the lumber was delivered, accepted, and converted subsequently on a secular day, will preclude a recovery by the seller in an action of *assumpsit* in *quantum valebat*.

The written contract between the parties executed on Sunday was void, and if the recovery depended upon the enforcement of this contract the plaintiff must fail in his action. But this is not a suit upon the written contract executed on Sunday; it is an action of *assumpsit* upon the implied promise of the appellee to pay for the lumber when he accepted it and converted it to his use upon a subsequent secular day.

No suit could be maintained upon the invalid Sunday contract, because it is, in law, no contract, but the implied obligation to pay in this case was assumed on a secular day, and this obligation is disconnected from the Sunday contract, and is enforceable to the extent of a recovery for the reasonable value of the property accepted and converted by the appellee.

The view we announce is not in conflict with any of the authorities for our state. The cases cited by counsel for the appellee as sustaining his position are easy of differentiation upon a careful perusal of them. It will be seen that some of the cases correctly hold that no recovery can be had upon a note executed on Sunday. Others hold that a suit is not maintainable on contracts made on Sunday where the property is delivered on that day or where the right to recover depends upon the void Sunday contract. *Woodson v. Hopkins*, 85 Miss. 171, 37 So. 1000,

37 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275, is not in point.

The case of *Strouse et al. v. Lanctot*, 27 So. 606, is especially cited by appellee as being in point and controlling in his favor here. We think this case comes nearer sustaining the appellee than any other that we have been able to find, but, in our opinion, it is not in point, for the reason that the suit there was based wholly upon the Sunday contract, and is different from the instant case in that here the action is not founded upon the Sunday contract, but is upon implied *assumpsit* on a secular day, in *quantum valebat*. There was no consummation by delivery on Sunday.

Text-book authority, as well as the decisions of other jurisdictions, abundantly support the view we announce above. 6 R. C. L. 821; 25 R. C. L. 1433. The rule is that no recovery can be had upon a void Sunday contract nor upon any obligation based upon, or growing out of, and dependent upon, a Sunday contract; but this principle has no application here, for the reason that the Sunday contract is independent of and disconnected from the implied assumption consummated by delivery and conversion on a secular day.

The rule announced in this case appears reasonable and just. It is not opposed to good morals or proper observance of the Sabbath. A contrary holding would furnish a safe harbor against the collection of honest debts for property accepted and converted by the debtor on secular days; he being a party to the Sunday contract which he invokes as a defense. No such evil purpose or unholy result was intended by the law.

The judgment of the lower court is reversed, and the case remanded.

*Reversed and remanded.*

## BERNSTEIN v. ANGELETTY.

[88 South. 273, No. 21796.]

EVIDENCE. *Plans and specifications under building contract admissible, though not signed.*

Where the contract is to build according to certain plans and specifications, and the building is constructed under them, as originally drawn or as modified, they are admissible in evidence in a suit by the contractor against the owner to recover a balance due on the contract, even though not signed by the parties for identification purposes, as stipulated in the contract; acting under them being a waiver of signing.

APPEAL from circuit court of Adams county.

HON. R. L. CORBAN, Judge.

Action by E. C. Angeletty against A. H. Bernstein. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

*Engle & Laub*, for appellant.

The court erred in not permitting this Exhibit A which consisted of the Bost plans and specifications according to which the building was to be built to be introduced in evidence and go before the Jury.

The statement in the agreement signed by both the parties that these plans and specifications were also signed for identification was merely for identification purposes and the mere oversight of the parties in signing same was no reason to prevent same from being introduced as an exhibit and placed before the jury.

This is particularly true when the plans were identified by the witness as being absolutely and the only plan drawn by Mr. Bost. There could, therefore, be no mistake as to these plans. Had there been any question of mistake as to these plans the appellee would have readily had Mr. Bost testify whether he had drawn up more than one set of

plans for a stable for Bernstein. Mr. Bost is a resident of Natchez, Mississippi.

The statement that the plans were signed was merely for identification purposes and the fact that the parties overlooked signing same should not prevent the introduction of these plans when they can be otherwise identified. This court should know that the plans and specifications are not only referred to as being the plans which the parties had signed but are referred to as being the plans for said stable drawn by R. E. Bost and when there is testimony, as there is in this case, that there was but one set of plans drawn by Mr. Bost for the stable, then the identification is complete.

We therefore submit that it was gross error to refuse the appellant in this case the right to introduce these plans and specifications and have same read and presented to the jury.

Without these plans and specifications in the case, the appellant was absolutely handicapped in presenting to the jury properly what the appellee had contracted to do and wherein he had failed to carry out his building operation according to the plans and specifications; without the introduction of these plans and specifications the appellant would be absolutely unable to make out his several items wherein the contractor, the appellee, had departed from his contract in failing to comply with the plans and specifications according to which the building was to be built.

A reading of the record in this case by this court must convince your Honor that the refusal of the trial court to permit the introduction of these plans and specifications was error highly prejudicial to the rights of the appellant in the trial of this case. We therefore submit that for this gross error in the trial of this case that this case should be reversed and that the appellant should be permitted to introduce these plans and specifications before the jury trying same for the reason that they are suffi-

ciently identified as being the plans and specifications in question.

At least they should be allowed to go before the jury under proper instruction if there is any question that they are not the identical plans and specifications referred to.

*Ratcliff & Kennedy*, for appellee.

It was not error for the court to exclude the original plans and specifications, unsigned, from the consideration of the jury, because the contract between the parties stated that the plans and specifications by which the barn was to be built was to be signed by the parties, and appellee testified, and the plans showed upon their face, that they had not been signed. Appellee gave as the reason therefor that certain things thereon named had to be marked out or cut out before he would sign them. However, appellant got the entire benefit of the provisions of the plans and specifications because when the court sustained the objection as to the introduction as to the plans and specifications, but stated: "I will let the witness state what the agreement was;" then counsel took the plans and specifications, and item by item read to the witness, and asked whether or not that particular work was done, and the witness thereby testified as to each particular item in the original plans, to the same effect and with the same benefit as if the writing itself had been introduced.

So, briefly, the answer to the first assignment of error as to the exclusion of the plans and specifications from the consideration of the jury is: First: They were not admissible because not identified according to the contract between the parties, and were unsigned. Second: Because the evidence showed that the barn was not to be built according to the original specifications but that the same had been changed by the parties in order to reduce the cost price. Third: The appellant received the benefit of each provision in the original plans by reading from those plans to the witness the several requirements and

asking if each work complied therewith. Fourth: The appellant accepted the work; went into occupation of the barn; paid all the contract price except ninety-eight dollars, and never objected to any items until suit for the balance due on the purchase price.

HOLDEN, J., delivered the opinion of the court.

The appellee, Angeletty, sued the appellant, Bernstein, for ninety-eight dollars as a balance due appellee for the building of a barn. Bernstein defended on the ground that Angeletty was due him more than the amount sued for, on account of the failure of Angeletty to build the barn according to the contract. Bernstein appeals from the judgment against him.

The appellee, Angeletty, plaintiff below, testified at the trial that he contracted to build the barn for five thousand dollars, and that he had constructed the building according to the contract, and Bernstein was due him a balance of ninety-eight dollars. He further testified on cross-examination that Mr. Bost, an architect, had drawn the plans and specifications for the building, but that he had not signed the plans and specifications, as they had been modified and changed by agreement between him and Bernstein.

The appellant, Bernstein, testified that the building was to be constructed according to the said plans and specifications of Architect Bost, for the sum of five thousand dollars; that the contract was in writing, which he introduced in evidence, and reads in part as follows:

"Witnesseth, that the said contractor agrees to furnish all necessary materials with the exception of electric wiring and plumbing and to do all work required to build a brick stable on the north side of Main street, Natchez, Mississippi, owned by said Bernstein, the said work to be done in a workmanlike manner as soon as possible after this date and the said work and material will be strictly according to plans and specifications for said stable

drawn by R. E. Bost and here referred to and which said plans and specifications have been signed by the parties hereto for identification."

"The price of said work completed to be the sum of five thousand (\$5,000) dollars. Payment to be made to said contractor as follows," etc.

This contract was signed by both parties, but the plans and specifications mentioned therein, which were said to be signed by both parties for the purpose of identification, were never signed by either party. Appellant, Bernstein, testified that the appellee, Angeletty, had failed in many respects to comply with the contract according to the plans and specifications, which resulted in damage to Bernstein in a sum greater than the amount sued for by plaintiff. Bernstein offered the plans and specifications in evidence, but upon objection by plaintiff the court refused to allow their introduction, and this action of the court is assigned for reversal.

It seems that the lower court refused to permit the introduction of the plans and specifications because they had not been signed, for identification purposes, by the parties. It appears, however, from the testimony of the appellant, and the written contract between the parties introduced in evidence, that the plans and specifications drawn by Architect Bost are the plans and specifications mentioned in the written contract, and that the building was constructed according to them; whether the construction was to be according to the original plans as testified by Bernstein, or whether the construction of the building was to be by the modified plans as testified to by Angeletty, was a question of fact about which there was a conflict in the testimony, and should have been determined by the jury. Therefore we think the court erred in not permitting the introduction of the plans and specifications in evidence.

The appellee, Angeletty, could recover only upon his written contract; and, while he attempted to recover on an oral contract, there being no objection by defendant.

vet when the written contract was introduced by Bernstein, which showed the terms of the contract, and that the construction of the building was to be according to the plans and specifications of Architect Bost, then the appellant Bernstein should have been permitted to introduce the plans and specifications in making out his defense so that he might be enabled to show the jury where in the appellee ALgeletty, had failed to comply with the contract. Acting under the plans and specifications amounted to a waiver, and made them admissible in evidence, because the plans and specifications were part of the contract, and the building was constructed according to them, either as originally drawn or as modified. They were the only plans and specifications ever in existence, according to the record, and were very material evidence to the defense.

The judgment of the lower court is reversed, and the case remanded.

*Reversed and remanded.*

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FRATERNAL AID UNION v. WHITEHEAD.

[88 South. 274, No. 21472.]

APPEAL AND ERROR. *Decision by division not transferred to court in banc on suggestion of error.*

This court when working in divisions will not transfer a suggestion of error filed against an opinion decided by a division to the court *in banc* on motion of the litigant, but will use its own discretion as to whether it will do so.

Motion to transfer to court *in banc*. Overruled.

For original opinion, see 87 So. 453.

ON MOTION.

ETHRIDGE, J., delivered the opinion of the court.

This is a motion filed by the appellant to transfer the suggestion of error to the court *in banc* on the ground that the effect of the previous decision (87 So. 453) is to destroy section 20 of chapter 206, Laws of 1916, on the ground that it is unconstitutional. Counsel misunderstood the decision heretofore rendered. It does not hold section 20 of chapter 206, Laws 1916, void, nor does it impair or abridge that section. The trouble is that section 106 of the constitution and by-laws of the appellant does not conform to what is authorized by section 20 of chapter 206, Laws 1916. The section of the constitution of appellant is much broader than what is authorized by the statute of the state above quoted. This court, when working in divisions, will not transfer a suggestion of error to the court *in banc* at the instance of the litigant. It will do so of its own motion when it seems to it proper to do so.

*Overruled.*

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TALLAHATCHIE COMPRESS & STORAGE CO. v. HARTSHORN.

[88 South. 278, No. 21652.]

1. EVIDENCE. *Parol agreement as to place of storage admissible where receipt silent.*

Where a warehouse receipt for the storage of a bale of cotton is silent as to the place of storage, evidence is admissible to show a prior parol agreement which specifies the place of storage.

2. WAREHOUSEMEN. *Warehouseman storing goods in place different from that agreed on does so at his own risk.*

Where a warehouseman has contracted to store goods in a particular place, and breaches his contract and stores them in a different place, it is at his own risk, and he is liable for any damage or injury to the goods which occurs, even without his fault or negligence.

APPEAL from circuit court of Leflore county.

HON. S. F. DAVIS, Judge.

Action by Mrs. J. B. Hartshorn against the Tallahatchie Compress & Storage Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*Wells, Stevens & Jones*, for appellant.

The warehouse receipt in this case is the written contract and the sole evidence of the contract, and affirmatively exempts the defendant from liability for fire.

The adjudications are not altogether clear as to the legal effect of a warehouseman's receipt. By statute in many states, and especially in Mississippi (sec. 2295, Code of 1906), a warehouse receipt is made conclusive evidence in the hands of a *bona-fide* holder for value, that the property has been received and stored and entitles the holder to delivery of the property or the value thereof. These receipts are now recognized both by law and commercial usage as constituting negotiable or at least *quasi* negotiable instruments. They pass by delivery and the assignee may sue in his own name for the recovery of the property or for the value thereof.

The doctrine of assignability was early recognized by the supreme court of the United States. In *Gibson v. Stevens*, 8 Howard, 384, Chief Justice TANNEY observes: "In the opinion of the court it (the certificate) transferred to him the legal title and constructive possession of the property; and the warehouseman from the time of this transfer became his bailee and held the pork and flour for him. The delivery of the evidence of title and the orders indorsed upon them was equivalent . . . to the delivery of the property itself."

The doctrine has been followed by the state courts, and as stated by the supreme court of Ohio: "Receipts of this kind are like bills of lading, drafts, bills of exchange, etc., instruments *sui generis*, and as such from long and general use in commerce and trade have come to have a well

understood import among business men. Warehouse receipts operate as an estoppel against the maker and the latter cannot assert that he has not received the goods. It serves as a voucher in the hands of the consignee and is freely used in selling cotton or grain and in making pledges. We mention these general principles to emphasize the point which we here make, that the warehouse receipt is not a mere scrap of paper and is something more than a mere receipt. By law and by commercial usage it has become a species of contract. There is no question but that it is binding upon the maker, and there is no question but that the maker has the constitutional and legal right to enlarge or restrict his liability so long as he does not undertake to exempt himself against his own negligence. There is of course authority that a mere receipt can be contradicted by parol evidence, but if the receipt is something more than a mere receipt and something more than a mere acknowledgment of the possession of goods, it has the additional character of a contract. The necessities of trade and business suggest and require an abbreviated form for the instrument. In the case at bar the receipt affirmatively states on its face one bale of cotton marked as per margin heretofore, which they agree to deliver on return of this receipt and payment of all charges. Possession of this receipt evidences title of property, act of providence, fire and cold damage excepted. We take it that counsel will not seriously deny that this receipt undertakes affirmatively to exempt the company from loss by fire. The receipt identifies the cotton, states its quantity and weight and fixes upon the warehouseman liability for its safe return to the true holder of the receipt. No time limit is fixed for the bailment. The warehouseman does not expect to deal any further with the original bailor. The cotton compress company knows that this cotton will be worked out into the channel of trade and that this receipt will be presented by some purchaser or pledgee, if it is to be binding upon the holder. It is stated in 30 Amer. & Eng. Encyclopedia of Law (2 Ed.), p.

78: "Although the primary function of a warehouseman's receipt is merely to acknowledge possession of the goods, yet it sometimes is given the additional character of a contract. If it is simply a receipt it may be explained by parol, but if it is a contract it stands on the footing of other contracts in writing and cannot be varied or contradicted by parol evidence. In *Tarbell v. Farmer's Mutual Elevator Company*, 44 Minn. 468, the court says:

This instrument embraces both a receipt and a contract. The first part of it is merely a technical receipt, while the last part of it, particularly that called conditions, is a contract. Where an instrument embraces both a receipt and a contract the receipt like any other, is open to variation by parol while the contract is as much guarded against such variation as if in a separate instrument. . . . "The latter part of the instrument is a contract and cannot be varied by parol."

We respectfully submit that our own court in *Mortimore v. Ragsdale*, 62 Miss. 86, has construed a warehouseman's receipt as evidencing the contract between the parties. Our court, by Judge COOPER, said: "The legal title to the cotton was one thing, the right to require a delivery of it by warehouseman was another. The one might be acquired by a legal purchaser and what was a legal purchaser would be determinable by the rule of law; the other could be gained only by conformity to the contract of bailment, and these terms are disclosed by the face of the receipts."

Here the court uses the language: "These terms are disclosed by the face of the receipts, indicating especially what was the court's mind, and, we submit, expressly holding that the terms of the contract of bailment are evidenced by the warehouse receipt is also a contract. In *Tussing v. Haslett Cal.*, 54 L. R. A. 774, par. 2, of the head notes reads: "A notice printed plainly on the face of the warehouse receipt to the effect that loss by leakage shall be at the risk of the owner of the goods is a part of the contract."

In the course of the opinion the court said: "There is no public policy to be infringed by stipulations limiting their liability for loss or deterioration caused by inherent qualities of the articles stored or by defects in the facilities containing them. They may make such terms as they choose to impose as conditions of their contract. This would not exempt it from liability for leakage due to its fault, etc."

This we take to be good law in any jurisdiction, or at least in any civilized country. The right of contract is a sacred right, and there is no public policy or law of any kind that would stand in the way of a warehouseman limiting or restricting its liability, and certainly where the law itself does not impose upon a warehouseman a liability for a non-negligent fire, surely the parties can contract expressly against such an event or hazard. Having so contracted, the contract between the parties cannot be contradicted, added to or varied by parol.

Our court had under observation the legal effect of a warehouse receipt in *Warehouse Co. v. Cotton Company*, 87 Miss. 228, 39 So., 417. The opinion sheds light upon the present inquiry and the language of Judge TRULY, speaking for the court is in part as follows: "As to the warehouse receipt, representing the twenty bales of cotton involved in this controversy the Meridian National Bank is already shown to be a *bona-fide* holder. The receipt was acquired by the bank in due course of its dealing with a regular customer, for full value, and without notice of any understanding or secret equities which might have existed between the Star Compress & Warehouse Company and the Meridian Cotton Company. Under such state of case the warehouseman issuing the receipt for cotton deposited for storage or compressing cannot be permitted to assert, as against a subsequent *bona-fide* holder of such receipt, any defense unless predicated of fraud, except those expressly provided for in the face of the receipt. The express language of the receipt here under consideration precludes the assertion of the defense

by which the appellant seeks to defeat recovery. By it the Star Compress & Warehouse Company acknowledges the receipt of the cotton and binds itself to deliver the same, or pay the cash market value thereof, to the legal holder of this receipt, acts of providence, fire, and damage excepted. It further stipulates that the receipt shall be negotiable and transferable by indorsement, and then provides: No debt, demand, or set-off will be claimed against said cotton, except such as may be due by the holder at the time of presentation. The object of storing cotton and other commodities and accepting in lieu thereof receipts issued by warehousemen, is that the owners of the goods so deposited may have some evidence of ownership easily and readily negotiable, which may be dealt with without requiring repeated handling and actual delivery of a bulky commodity. The negotiability of such receipts and their commercial value is largely enhanced by the very fact that they are incontestable, and are dealt with as evidencing by their transfer the actual delivery of the commodity represented by the receipt. Their value as a convenient and safe method of commercial dealing and their ready negotiability would be diminished, if not practically destroyed, should the warehouseman issuing the receipt be permitted to assert as against subsequent holders private agreements with, or personal claims against, the original holder. In truth, the receipt in question practically embodied on its face the provisions now found in our statute law (See Laws 1904, ch. 89, p. 125) by which all warehouse receipts are made conclusive evidence in the hands of a *bona-fide* holder for value that the property mentioned in the receipt has been received, and entitles such holder to a delivery of the property so stored or deposited, or to the value thereof.

In *Leonard v. Dunton*, (Ill.), 99 Am. Dec. 569, the supreme court of Illinois expressly held that: "The warehouseman's receipt in that case must be held as a contract of the parties as to this wheat, and parol evidence to change its terms is inadmissible. The claim of appel-

lent, therefore, that it was understood and agreed that the wheat should be free of charge for a short time only cannot be allowed."

It frequently happens that a document embraces both a receipt and a written contract. This was the case in *Johnson v. Johnson*, 74 Miss. 549. Judge WHITFIELD referred to a number of authorities and held that the so-called receipt for money in that case not only was a receipt for the money, but a stipulation as to how it should be applied, and that parol evidence to contradict its terms was not permissible.

*Gardner, McBee & Gardner and Alfred Stoner*, for appellees.

As to whether or not proof is admissible in this case, we beg to quote just a few authorities along this line. One of the principal authorities, and one which we think will control, if there is any doubt in the mind of the court, as to the right to show where this cotton was agreed to be stored, is Ruling Case Law, recognized as a great authority. Ruling Case Laws says:

"PAROL EVIDENCE AS TO RECEIPTS.

"In regard to receipts in general, it is the established principle that a mere receipt, not used or designed to embody and set out the terms and conditions of a contract, does not preclude parol evidence of the agreement between the parties; while, on the other hand, a written contract, as a general rule, does preclude such evidence. So a warehouse receipt may recite so little of the agreement between the parties that it cannot rise to the dignity of a contract, and in such case evidence may be received of the terms of the contract, and when a warehouse receipt specified no particular place for the storage of the goods, evidence is admissible to show a prior parol agreement which does so specify." 27 R. C. L. 964; 3 Anno. Cas. 468; *Grenada Cotton Compress Co. v. Wm. Atkinson*, 94 Miss. 93.

This same authority also says: "The general rule that parol evidence is inadmissible to contradict, vary, or to explain the terms of a writing, has not application where an instrument constitutes a written contract not used or designed to embody and set out the terms and conditions of a contract." 10 R. C. L. 1025; 82 A. S. R. 771.

This court has well said in the case of *Baum v. Lynn*, 72 Miss. 932, speaking through Judge COOPER that: "The text books and decisions abound in confused and confusing writings upon the subject of the admissibility of parol evidence introduced for the purpose of showing the consideration of written contracts, or of proving what are called collateral contracts, i. e., contract not evidenced by the written one, but which constitute the consideration upon which the written one in turn rests, or which are separate and disconnected from the written one, not covered by nor inconsistent with its terms. Mr. Stephen, in his admirable digest of the law of evidence thus formulates the rule and its limitations: 'When any judgment of any court, or any other judicial or official proceeding, or any contract, grant or any other disposition of property, has been reduced to the form of a document, or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible; nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence; provided, that any of the following matters can be proved: (1) Fraud, intimidation, illegality, want of due exception, want of capacity in any of the contracting parties, the fact that it is wrongly dated, want or failure of consideration or mistake in fact or law, or any other matter which, if proven, would produce any effect upon the validity of any document, or any part of it, or which would entitle any person to any judgment, decree or order relating thereto. (2) The existence of any separate oral agreement as to any matter which is

not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them." *Baum v. Lynn*, 72 Miss. 932.

We submit that under this rule laid down by Judge COOPER in *Baum v. Lynn*, that it is competent in this case to prove an oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms.

In other words, we contend that the warehouse receipt alleged to be the contract in this case, is not a contract at all, and does not show all of the terms and conditions agreed upon between the parties, and that the introduction of parol testimony to show a prior parol agreement as to where the cotton would be stored, is not at all inconsistent with its terms and does not violate the rule against the instruction of parol testimony to vary or modify a written contract.

And again Mr. Wigmore in a splendid work on Evidence, Vol. 4, section 2432, says: "A receipt, i. e., a written acknowledgment handed by one party to the other, of the manual custody of money or other personalty will in general fall without the line of the rule, i. e., it is not intended to be an exclusive memorial. This is because usually a receipt is merely a written admission of a transaction independently existing, and like other admissions, is not conclusive."

American & English Ency. of Laws, says: "If a warehouse receipt is simply a receipt acknowledging receipt of goods, it may be explained by parol." 30 A. & E. Ency, of Law, page 78.

The identical questions involved in this suit, first, the liability of the bailor under a special contract of bailment, and second, the right to show by parol evidence the place of storage agreed upon before the delivery of the goods, were involved and decided in the case *McCurdy v. Walblom Furniture & Carpet Company*, 94 Minn. 326, anno-

tated in the third volume of A. & E. Anno. Cases, 468. All the questions involved here were discussed and decided in that case, the court holding:

"That agreement was made before the issuance of the warehouse receipt, in form indefinite as to place of storage. The conversation between the bailor and the bailee, taken in connection with the delivery of the goods and all immediate, subsequent transactions, prove a valid parol agreement, in which were specified, with sufficient definiteness, the parties, the consideration, the goods to be stored and the place of storage." *McCurdy v. Walblom Furniture & Carpet Co.*, 9 Minn. 326; 3 Anno. Cas. 468.

In other words, the court holds that the prior parol agreement can be shown where the receipt on its face does not show the place of storage, as in this case. This case of itself, we think is sufficient to sustain our position, but it has since been reaffirmed in the following cases: 128 Minn. 414, L. R. A. 1915 D. 476; 81 Kan. 146; 24 L. R. A. (N. S.) 1120; 71 Wash. 205; 67 Ore. 533; 23 Pa. Dist. 246; 191 Mich. 385.

We therefore say, with confidence that the court was correct in sustaining our demurrer to appellant's special plea setting up these warehouse receipts as contracts, and also that the court was not in error when it overruled appellant's objection to the testimony which was introduced, showing the parol agreement between appellee's husband and son and the superintendent of appellant's compress and warehouse, in which he, the superintendent, agreed, in consideration of this cotton being stored with appellant, to put all of her cotton as it was received in the brick compartment of appellant's warehouse, in which the proof shows it was safer and the insurance fifty per cent. less than in the wooden compartment.

SYKES, J., delivered the opinion of the court.

The appellee, Mrs. Hartshorn, plaintiff in the circuit court, sued the appellant compress company for the value

of seventy-four bales of cotton destroyed by fire. The declaration contained three counts. The first count alleged that the defendant had agreed with plaintiff to store her cotton in the brick compartment of the defendant's warehouse, and breached this agreement and stored the cotton in the wooden compartment, and that while the cotton was in the wooden compartment it was totally destroyed by fire. The second count alleged that plaintiff had been a customer of the defendant for several years, and was in the habit of storing her cotton in the defendant's warehouse. The plaintiff realized the danger of storing cotton in the wooden compartment, and had instructed the defendant to store her cotton in the brick compartment, where it would be safe from fire, and that the defendant, in recognition of this request, had stored plaintiff's cotton in the brick compartment, whereby a custom had arisen between plaintiff and defendant, in consideration of her patronage, and that it had therefore become the duty of the defendant to store all of plaintiff's cotton in the brick compartment, and that in violation of this custom defendant had stored the cotton which was destroyed in the wooden compartment. These two counts were for breach of contract. The third count was based in tort. It is unnecessary to state it because a nonsuit was taken as to this count by plaintiff. Because of this nonsuit it is also unnecessary to notice the demurrer of defendant to the declaration, which demurrer had been overruled by the court, because the taking of the nonsuit as to the count in tort left the declaration only stating a cause of action for breach of contract. There was a recovery by plaintiff in the circuit court in accordance with the declaration, and the appeal is here prosecuted by the defendant in the lower court.

The testimony for the plaintiff is to the effect that some time in August, 1917, about the time the plaintiff began picking cotton, her husband had a conversation with the superintendent of the defendant company, in which conversation plaintiff's husband stated to the superintendent

that plaintiff desired her cotton stored in the brick compartment of the compress; that the reason he stated to the superintendent why he wished it placed in the brick compartment was because the insurance rate was cheaper there than in the wooden compartment. He states also as a further reason why he wished it placed there was because it was safer from fire in the brick compartment.

The son of the plaintiff also testified that before any cotton was brought to the compress that year he had a conversation with the superintendent of the compress company in which he told the superintendent to put his mother's cotton in the brick compartment, and that the superintendent agreed to do so, and that it was because of this agreement that he stored the cotton with the defendant company; that the reason they wished the cotton stored in the brick compartment was because they did not expect to sell it as fast as it was gathered and they thought it was safer in the brick compartment.

This oral agreement to store plaintiff's cotton in the brick compartment is denied by the defendant's witnesses.

The plaintiff's testimony is to the effect that because of the promise to store their cotton in the brick compartment they delivered it to the defendant company. Upon receipt of a bale of cotton this company issued to plaintiff a warehouse receipt for each bale of cotton. These receipts are all similar, and are as follows:

"Tallahatchie Compress & Storage Company,

Tag No. \_\_\_\_.

"Greenwood, Miss. \_\_\_\_.

"Have received from \_\_\_\_ one bale of cotton.

Weight.....marked as per margin hereof which they  
agree to deliver upon the return of this  
Marks.....receipt and payment of all charges. Acts  
of Providence, fire and old damages ex-  
Numbers.....cepted. Possession of this receipt evidences  
title of property.

Condition.....

"\_\_\_\_\_, Superintendent."

The testimony shows the plaintiff's cotton was actually stored in a wooden compartment, and while in a wooden compartment was destroyed by fire of an unknown origin; that, if the cotton had been stored in the brick compartment, it would not have been destroyed by this fire.

There are two principal contentions of the appellant which deserve our notice. The first is that the warehouse receipt in this case is the written contract and the sole evidence of the contract, and affirmatively exempts the defendant from liabilities for fire. As will be noted this warehouse receipt does not embody all of the terms of the contract of bailment. The amount of charges per month are not stated on this receipt, and it is also silent as to the place of storage. There is a clause contained therein which is evidently meant to exempt the compress company from loss by "acts of providence, fire and old damage excepted." It is the contention of the appellant that all testimony relating to the verbal agreement to store the cotton in the brick compartment of the warehouse was inadmissible because the receipt itself was the written contract. This receipt does not attempt to state all of the terms of the bailment. As a contract it is incomplete upon its face. That being true, it is competent to prove by oral testimony agreements relating to this bailment which did not vary, alter, or contradict the contractual parts of the warehouse receipts.

This rule is aptly stated in vol. 27, R. C. L. p. 964, par. 19, as follows:

"So a warehouse receipt may recite so little of the agreement between the parties that it does not rise to the dignity of a contract, and in such a case evidence may be received as to the terms of the contract, and when a warehouse receipt specifies no particular place for the storage of the goods, evidence is admissible to show a prior parol agreement which does so specify."

In the case of *Baum v. Lynn*, 72 Miss. 932, 18 So. 428. 30 L. R. A. 441, this court quoted with approval the rule laid down in *Stephens on Evidence*, when parol testimony could be introduced to prove what are called collateral

contracts; that is, contracts not evidenced by the written one, but which constitute the consideration upon which the written one in turn rests. In this rule Mr. Stephens states that parol evidence may be introduced to show:

“(2) The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.”

This identical question is so decided in the case of *McCurdy v. Wallblom Furniture & Carpet Co.*, 94 Minn. 326, 102 N. W. 873, also reported in 3 Ann. Cas. 468.

The court was correct in permitting this oral testimony as to the agreement to store the cotton in the brick compartment.

It is next contended by the appellant that there can be no recovery, because the fire and the consequent loss by fire was not the proximate result of the breach of the contract complained of. Appellant relies upon the cases of *Wharfboat Ass'n v. Wood*, 64 Miss. 661, 2 So. 76, 60 Am. Rep. 76; *Railroad Co. v. Millsaps*, 76 Miss. 855, 25 So. 672, 71 Am. St. Rep. 543; and *Anderson v. M. & O. R. R. Co.* (Miss.), 38 So. 661. In these three Mississippi cases the gravamen of the offense was the negligence of the defendants in failing to ship cotton within a reasonable time or a negligent delay in shipping cotton. The cotton in each instance was destroyed by fire. These fires were not caused by any negligence of the defendants. In these cases the court held that the negligence of the defendants, that is, the unreasonable delay in the shipping of the cotton, was not the proximate cause of the injury to plaintiffs, but that the proximate cause of this injury was the fire.

In this case, however, we are presented with a different question. This suit is for the breach of the contract, the contract being to store the cotton in the brick compartment, and the breach consisting of its being stored in another compartment, namely, a wooden compartment. The

testimony of the plaintiffs shows that they made this agreement because they could get cheaper insurance when the cotton was stored in the brick compartment, and for the further reason that they knew it was a safer place for their cotton to be stored. The testimony shows that it was less apt to be destroyed by fire when in the brick compartment. In fact, the very testimony which shows that the insurance was cheaper in the brick compartment would lead one at once to believe that for this reason it was less apt to be destroyed by fire when stored in the brick compartment. There was a total breach of the contract of bailment. The great weight of authority in a case of this kind is that, where there has been a total breach of the contract of bailment, and the goods have been injured or destroyed, whereas if the contract had been complied with there would have been no injury or destruction, then the plaintiff is entitled to recover. A few cases can be found upholding the contrary doctrine. Among these few is that of *McRae v. Hill*, 126 Ill. App. 349.

When a warehouseman agrees to store goods in a particular place and complies with his contract, he is, of course, not liable for the loss of these goods, unless this loss be due to his negligence. This rule is elementary. But when he agrees to store goods in a particular place and stores them in a different place, he has breached his contract of bailment, and is therefore responsible for the return of the goods or for their value. He stores them in a different place at his own peril. This rule is thus laid down in Elliott on Contracts, vol. 4, section 3100:

"The warehouseman must comply with the contract of storage. If he has contracted to store goods in a specified warehouse, or in a particular place, and stores them in a different place, it is at his own risk, and he is liable for any injury which occurs, even without his own negligence."

To the same effect are 40 Cyc. 431; 27 R. C. L. 999; 6 C. J. 1111; *Wiley v. Locke*, 81 Kan. 143, 105 Pac. 11, 24 L. R. A. (N. S.) 1117, 19 Ann. Cas. 241. Copious notes

reviewing practically all of the decisions upon this subject are found in the last two reports.

Another late case upon the subject is that of *Mortimer v. Otto*, 206 N. Y. 89, 99 N. E. 189, reported in 31 Ann. Cas. 1914A, 1121. That case is quite similar to the one under consideration. In the *Otto Case* the agreement was to store certain household furniture in a specified room. In violation of this agreement they were stored in another building and destroyed by a fire which originated without any negligence on the part of the defendant. Among other things, it is said in the opinion that :

"They [the defendants] by their express agreement subjected themselves to the additional obligation that they would store the goods in a specified place. No degree of care or vigilance, short of complete performance would relieve them of that obligation. . . .

"The plaintiff and her assignor were depositing their property with the defendants, and a regard for its safety and security while in the keeping of the defendants was obviously within their contemplation and, it may . . . be assumed, known to the defendants. For the purpose of making effective that regard, they, with the permission and concurrence of the defendants, selected the precise place of storing. Fire is an ordinary and frequent agency of destruction or injury, and safety as against it was in the contemplation of the parties when they agreed that the property should be stored in the specified room. Had the property been there stored, the plaintiff and her assignor would have assumed all the risks of injury to it except those ordinarily imposed by law upon the defendants as bailees. When, however, the property was burned in the building in which the defendants in fact placed it, the consequent loss and damage was that which the parties apprehended and sought to avoid through the agreement that the property should not be there, and the defendants must indemnify the plaintiff therefor."

The plaintiff's testimony showed a special agreement to store her cotton in the brick compartment. The uncon-

tradicted testimony showed that the cotton was stored in the wooden compartment and there destroyed by fire, and that, had the cotton been stored according to contract in the brick compartment, it would not have been burned or damaged.

Under this testimony the plaintiff was entitled to recover, and the judgment of the circuit court is affirmed.

*Affirmed.*

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ELLIS *et al.* v. TILLMAN *et al.*

[88 South. 281, No. 21769.]

**HIGHWAYS.** *Commissioners have no authority to let contracts until engineer's survey and estimate adopted and ratified.*

The provisions of section 5, chapter 176, Laws of 1914 (Hemingway's Code, section 7162), providing for the appointment of road commissioners and requiring them to employ a competent engineer to survey and lay out such road or roads as should be selected by such commissioners to be constructed and maintained, and making it the duty of such engineer to make an estimate of the cost of constructing and maintaining such highway for each separate mile covered by such survey, and to report the survey and estimate to the commissioners before contracts are let for the construction, or the construction and maintenance of such roads, are mandatory, and until such surveys and estimate have been filed and adopted by the commissioners and ratified by the board of supervisors, the commissioners are without authority to let contracts for the construction of such roads.

APPEAL from chancery court of Copiah county.

HON. V. J. STRICKER, Chancellor.

Suit by E. B. Tillman and others against I. N. Ellis, Sr., and others, for an injunction. From a decree overruling a motion to dissolve a preliminary injunction, respondents appeal. Affirmed.

*Miller & Hendricks, and Wilson & Henley, for appellants.*

We contend: (1) This feature of section 7162 is directory and not mandatory, and therefore a failure to observe the same would not invalidate the contract. (2) If mandatory there has been a substantial compliance therewith, which is sufficient.

In considering both of these contentions it is very important that we keep the purpose of this part of the statute ever before us, and for this reason we intend first to discuss its object.

"Whether a particular statute is mandatory or directory does not depend upon its form, but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object and the consequences that would result in construing it one way or the other." 36 Cyc. 1157.

If a fair interpretation of this statute shows that its object was to prevent the road authorities from squandering the people's money it should be construed as mandatory; but should it appear to be for the guidance of the highway officer, and to secure a uniform method of procedure in letting these contracts throughout the state, and providing a business-like method for the same it should most certainly be construed as directory. If directory a failure to observe the same will not invalidate the contract of the district with Bass for the construction of these roads. See 36 Cyc. 1157.

The only question in this entire record is the necessity *vel non* of a technical compliance with this feature of the statute; is a prerequisite to entering into a valid and binding contract.

We cannot agree with the court below that the purpose of this estimate was to determine whether or not the work should be undertaken. The qualified electors had already settled this question at the ballot boxes when they voted in favor of issuing bonds for this work.

Nor was it the purpose of this requirement to determine whether only a part of the work should be undertaken, and whether the same expenditure might be more judiciously made upon another road. It is sufficient to call the court's attention to the fact that under the system provided for, such estimates were to be made only upon roads which had already been selected and designated by the authorities.

It does not appear that the purpose of this work was to furnish information which would assist the highway officers in determining whether or not the bids were fair and competitive. For as the work is let out on the unit basis, and the bids of the different contracts not only vary as a whole but especially as to the different kinds of work, it would be impossible to determine which is the cheapest and best bid without knowing the approximate amounts of the different kinds of work that would be necessary. For instance, a contractor might have the lowest bid on three items, and his bid not be the cheapest when figured as a whole.

When we consider the disastrous consequence should the court place the construction on this statute contended for by appellee, it is manifest that the legislature must have intended for it to be directory. If the contract does not bind the district and the county, it certainly does not bind the contractor. Could it be thinkable that our legislature intended to prescribe a schedule of acts which all highway officers must literally and technically fulfill before a valid contract can be made? If this be true any contractor who sees that he is losing money would only have to look through the list and find an "i" undotted here and a "t" uncrossed there and inform the county authorities that they had no contract. It was to avoid such situation that the legislature specifically provided that all acts and proceedings in assessing taxes were governed by directory statutes.

*M. S. McNeil*, for appellee.

By reference to the data furnished by the engineer approved by the commissioners and adopted by the board of supervisors, it will be seen: First: That the road was never laid out and surveyed, as contemplated by the statute. Second: That no estimate was made of the cost of construction. Third: That no estimate was made showing the probable cost of maintaining said road, Fourth: There is no pretense that the data furnished by the engineers was made upon each separate mile.

It is insisted that if the commissioners could legally dispense with these requirements of the statute, then it would be in their discretion to construct gravel roads without any survey whatever.

The safest rule we are able to find defining the duties of a court in the construction of statutes and in determining whether or not the provisions of a statute are mandatory or directory is found in the case of *Koch, et al. v. Bridges, et al.*, 45 Miss. 258.

*Hope v. Flentge*, 140 Mo. 390, 41 S. W. 1002, 47 L. R. A. 805, holding that in all cases where the authority of the courts to proceed is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by statute the mode of proceeding is mandatory, and must be strictly complied with, or the proceeding will be utterly void. *Spencer's appeal*, 78 Conn. 301, 61 Atl. 1010; *Eccles Lumber Co. v. Martin*, 31 Utah, 241, 87 Pac. 713; *State v. Farney*, 36 Neb. 537, 54 N. W. 862; *Corliss v. Corliss*, 8 Vt. 373, holding that where a statute authorizing a division of real estate requires notice to be given the requirement of such preliminary notice is intended to secure to those affected an opportunity to be heard, and cannot be treated as merely directory. *Rex v. Cooke*, Cow. 25, 98 Eng. Reprint, 948; *Toronto v. Caston*, 30 Can. Sup. Ct. 390 (affirming 26 Ont. App. 459 (affirming 30 Ont. 16)); *Trenton v. Dyer*, 24 Can. Sup. Ct. 474 (affirming 21 Ont. App. 432); *Love v. Webster*, 26 Ont. 453; *Mckay v. Ferguson*, 26

Grant Ch. (U. C.) 569 (affirming 22 U. C. Q. B., 578); *Hurford v. Omaha*, 4 Neb. 336, 351; *State v. Barry*, 14 N. D. 316, 103 N. W. 637; *Tarver v. Tallapoosa County*, 17 Ala. 527; *Hugg v. Camden*, 39 N. J. L. 602; *People v. Morre*, 78 N. Y. App. Div. 28, 79 N. Y. Suppl. 7; *State v. Franklin County*, 35 Ohio St. 458; *State v. Lean*, 9 Wis. 279; *Young v. Leamington*, 8 App. Cas. 517, 52 L. J. Q. B. 713, 49 L. T. Rep. (N. S.) 1, 301 Wkly. Rep. 500; *Hunt v. Wimbledon Local Bd.*, 4 C. P. D. 48, L. J. C. P. 207; 40 L. T. Rep. (N. S.) 115, 27 Wkly. Rep. 123; *Frend v. Dennett*, 4 C. B. (N. S.) 576, 4 Jur. (N. S.) 897, 27 L. J. C. O. 314, 93 E. C. L. 576; See 44 Cent. Dig. Tit. Statutes, sec. 309; *Phelps v. Lodge*, 60 Kan. 122, 55 Pac. 840; *Shawnee County v. Carter*, 2 Kan. 115; *Koch v. Bridges*, 45 Miss. 247; *People v. Buffalo*, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563, (affirming 2 Misc. 7, 21 N. Y. Suppl. 601); *People v. New York*, 3 Misc. (N. Y.) 131, 23 N. W. 505; *Binder v. Langhorst*, 234 Ill. 583, 95 N. E. 400; *Phelps v. Hawley*, 52 N. Y. 23; *People v. Otsego County*, 51 N. Y. 401; *McConnell v. Allen*, 120 N. Y. App. Div. 548, 105 N. Y. Suppl. 16, reversed on other grounds in 193 N. Y. 319, 95 N. E. 1082; *People v. Herkimer County*, 56 Barb. 452; *People v. New York*, 11 Abb. Pr. 114; *State v. Barry*, 14 N. D. 316, 103 N. W. 637; *Carbaugh v. Sanders*, 13 Pa. Super. Ct. 361; *Ralston v. Crittenden*, 13 Fed. 508; 3 McCrary, 344; See 44 Cent. Dig. Tit. Statutes, sec. 308.

W. H. COOK, J., delivered the opinion of the court.

E. B. Tillman and other taxpayers of district number 1 of Copiah county exhibited their bill of complaint in the chancery court seeking to enjoin the board of supervisors, the road commissioners of the district, and J. M. Bass, road contractor, from proceeding further with the construction of a certain short link of gravel road known as the Pell road. A preliminary injunction was issued, and from a decree overruling a motion to dissolve this injunction, this appeal was prosecuted.

125 Miss.]

Opinion of the Court.

That portion of the bill of complaint which is material to an understanding of the question presented for decision, in substance, charges that, under the orders of the board of supervisors, an election was held for the purpose of authorizing the issuance of bonds to raise funds to construct and maintain gravel roads in district number 1 of the county, and as a result of such election bonds were issued and funds provided for that purpose; that under the provisions of chapter 176, Laws of 1914 (Hemingway's Code, section 7162), commissioners were duly appointed and qualified; that it was the duty of such road commissioners, subject to the approval of the board of supervisors, to determine what road or roads should be constructed, or constructed and maintained, or maintained in such road district; that it was the duty of such commissioners to let all contracts for the construction, or for the construction and maintenance, or for the maintenance of such roads in the manner provided by law for letting contracts for public work by the board of supervisors; that it was the duty of such commissioners to employ a competent engineer to survey and lay out such road or roads as should be selected by the commissioners; that it was the duty of such engineer to make an estimate of the cost of constructing such highway for each mile covered by such survey, and to report such survey and estimate to the commissioners before contracts were let for the construction, or the construction and maintenance, of such roads; that it was the duty of such road commissioners before letting contracts to report such survey and estimate to the board of supervisors; that it was the duty of the board of supervisors to order the clerk of the board to file the survey and estimate among the records of the office and spread the same on the minutes of the board, and make an order adopting such survey and estimate so reported and adopted by the commissioners; that until such survey and estimate were ratified by the board of supervisors, the commissioners were without authority to let contracts for the construction of such roads; that the commissioners failed to comply with these

statutory requirements, and that they were undertaking, in violation of law, to construct and maintain the gravel road known as the Pell road. The bill further charges that no survey of such road had been approved by the board of supervisors; that no estimate of the cost of constructing and maintaining said road for each separate mile had been made and filed with the board of supervisors; that the road commissioners had entered into some sort of private understanding or agreement with the defendant, Bass, to grade and build the road, and that they had failed and refused to submit to the board of supervisors any of their proceedings, to be ratified as provided by chapter 176, Laws of 1914.

It appears from the record made upon the hearing of the motion to dissolve the injunction that, at the time of the filing of the original bill in this cause and the issuance of the injunction, the only record of the road in controversy which appeared on the minutes of the board of supervisors was an order adopting the Pell road as one of the roads to be constructed out of the proceeds of the bond issue, and the following agreement was made a part of the record:

"It is agreed by counsel representing complainant and defendant that the minute book of the board of supervisors fails to show, up to the time of the filing of the original bill in this case, any estimate of the cost of construction of the road in controversy made by the engineers; that the minutes of said board fail to show any order approving any estimate made by the engineers, and fails to show that any contract was entered into between the commissioners of district No. 1 and J. M. Bass, contractor, for the construction of the road in controversy. That no action was taken by the board whatever, so far as the minutes show, up to the time of filing this bill, with reference to said road, except an order which appears upon the minutes on Minute Book M, p. 44, approving the selection of this particular road to be graded and graveled."

After the filing of the bill of complaint, and before appellants filed their answers, the board of supervisors entered an order *nunc pro tunc* amending its minutes, which order embodied a survey and estimate made by an engineer. This survey, as approved by the commissioners and ratified by the board of supervisors, being as follows:

"Pell Road: Length,  $1\frac{1}{2}$  miles. Clearing and grubbing, 1 a. Culverts, 12", 40 ft. Culverts, 18", 40 ft. Culverts, 24", 40 ft. Grading, 3,500 cu. yds. Gravel, 1,887 cu. yds."

The question presented for decision here calls for the construction of section 5, chapter 176, Laws of 1914 (Hemingway's Code, section 7162); that part of the section here involved being as follows:

"It shall be the duty of such commissioners, subject to the approval of the board of supervisors, to determine and fix what road or roads shall be constructed or constructed and maintained or maintained in such district or districts out of the proceeds of the sale of such bonds and the levy of such taxes; and it shall be their duty to let all contracts for the construction, or for the construction and maintenance or for the maintenance of such roads in the manner now provided by law for the letting of contracts for public work by the board of supervisors; and it shall be their duty to employ a competent engineer to survey and lay out such road or roads in such district or districts, as they shall determine upon, whose duty it shall be to make an estimate of the cost of constructing and maintaining such highway or highways for each separate mile covered by such survey, and report such survey and estimate to said commissioners before contracts are let for the construction or for the construction and maintenance of such highway or highways; which survey and estimate said commissioners shall have the power to adopt or reject and in the latter event to have another made; and when adopted, it shall be their duty to report the same to the board of supervisors, whose duty it shall be to order the clerk of said board to file the same among the record of

the office, and spread the same on the minutes of the board and make an order adopting such survey, and estimate so reported and adopted by such commissioners; all of which acts of said commissioners to be subject to the ratification or rejection by the board of supervisors."

It is the contention of appellants, first, that this section is merely directory, and, second, that if the section is mandatory, only a substantial compliance with the provisions thereof is required, and that the survey and estimate filed with the board, and which are herein set out in full, were a substantial compliance with the requirements of the section.

We cannot agree with the contention of appellants that the provisions of this section are merely directory. In chapter 176, Laws of 1914, the legislature has provided an elaborate and detailed scheme for the construction and maintenance of public roads by means of special taxation, and has minutely defined the duties of the various public officers who are charged with the construction and maintenance of these highways and the expenditure of the public funds required for that purpose. Section 5 of this act (Hemingway's Code, section 7162), provides for the appointment of three commissioners who shall have the management and supervision of the construction and maintenance of the roads constructed under the provisions of the act, and prescribes in detail the duties which shall be performed by these commissioners. Under the provisions of this section it is made the duty of the commissioners to determine and fix what road or roads shall be constructed, or constructed and maintained, or maintained, in the road district, out of the proceeds of the sale of bonds or the levy of taxes, and it is made their duty to employ a competent engineer to survey and lay out such road or roads as shall be selected by the commissioners, and the engineer so chosen is required to make an estimate of the cost of constructing and maintaining such highway for each separate mile covered by such survey. When this survey and

estimate has been filed with the commissioners, they have the power to adopt or reject it, and in the latter event to have another one made, and all the acts of the commissioners must be ratified by the board of supervisors.

The language of this section is plain, positive, and unambiguous, and we cannot rightfully exercise the power of frittering away the mandatory provisions thereof by calling them directory. It is urged that this survey and estimate are unnecessary and can serve no useful purpose, but we cannot say that the plain and positive requirements of this statute are unnecessary. In fact, it is easy to assign very good reasons for this requirement, and we think it was intended to serve a very useful purpose, but in any event, as well said by the learned chancellor in his opinion filed in this cause—

“Whatever the purpose may be of the requirement that the engineer lay out and survey the roads and then make an estimate of the cost of construction and maintenance for each separate mile, it is declared to be his duty to so do, and to report the same to the commissioners before the contracts are let for such construction, or for the construction and maintenance of such highways.”

We have seen no better expression of the rule applicable in determining whether the provisions of a statute are directory or mandatory than that found in *Koch v. Bridges*, 45 Miss. 258, 260, where Chief Justice PEYTON used language which we quote to approve and adopt, as follows:

“Statutory requisitions are deemed directory only when they relate to some immaterial matter where a compliance is matter of convenience rather than of substance.”

“This mode of getting rid of a statutory provision by calling it directory is not only unsatisfactory, on account of the vagueness of the rule itself, but it is the exercise of a dispensing power by the courts, which approaches so near legislative discretion that it ought to be resorted to with reluctance, only in extraordinary cases, where great public mischief would otherwise ensue, or important private interests demand the application of the rule. There is

no more propriety in dispensing with one positive requirement than another; a whole statute may be thus dispensed with when in the way of the caprice or will of a judge. And besides, it vests a discretionary power in the ministerial officers of the law, which is dangerous to private rights; and the public inconvenience, occasioned by the want of uniformity in the mode of exercising a power, is a strong reason for bridling this discretion. It is dangerous to attempt to be wiser than the law, and when its requirements are plain and positive, the courts are not called upon to give reasons why it was enacted. A judge should rarely take upon himself to say that what the legislature has required is unnecessary. He may not see the necessity of it, still it is not safe to assume that the legislature did not have a reason for it; perhaps it only aimed at certainty and uniformity. In that case, the judge cannot interfere to defeat that object, however puerile it may appear. It is admitted that there are cases where the requirements may be deemed directory. But it may be safely affirmed that it can never be where the act, or the omission of it, can, by any possibility work advantage or injury, however slight, to any one affected by it. In such case, the requirement of the statute can never be dispensed with.

\*“The legislative body is the supreme power of the state, and, whenever it acts within the pale of its constitutional authority, the judiciary is bound by it, and it is not competent for the latter tribunal to dispense with a regulation or requisition plainly prescribed by the former, or, to say that this mode, that, or the other, is as good as the one dictated by the legislature; for this, in fact, would be placing the judiciary above the legislature, by enabling the former to nullify the acts of the latter, or to supersede them by substitutes to which the legislature might not have assented had the proposition been submitted to it. The intention of the legislature should control, absolutely, the action of the judiciary. Where that intention is clearly ascertained, the courts have no other duty to perform than to execute the legislative will, without any regard to their

own views as to the wisdom or justice of the particular enactment. No principle is more firmly established, or rests on more secure foundations, than the rule which declares when a law is plain and unambiguous, whether it be expressed in general or limited terms, that the legislature shall be intended to mean what they have plainly expressed, and, consequently, no room is left for construction. And courts should adhere to the cardinal rule that the judicial functions are always best discharged by an honest and earnest desire to ascertain and carry into effect the intention of the lawmaking body."

If the foregoing principles, as announced by Chief Justice PEYTON, are applied to the statute under review, it is manifest that the provisions of this section must be held to be mandatory, and it is apparent that the filing of this survey and estimate is an antecedent or prerequisite condition to the exercise of the power of contracting for the construction, or the construction and maintenance of such highways.

We see no basis for the fears expressed by counsel for appellants that disastrous consequences will follow a construction of this statute, which requires highway officials to follow the plain and positive requirements of the statute, rather than some plan which they may deem more expeditious or convenient, but, on the contrary, in the expenditure of these large sums of public money, and in public improvements of such vast importance to the present and future generations, the only safe chart is found in a strict compliance with the legislative enactments authorizing such improvements.

It is clear from an examination of the survey as herein set out that there was no compliance with the provisions of the statute. If it should be conceded that the survey was sufficient, there is still no estimate of the cost of construction for each separate mile thereof, or the cost of maintenance of the road in question, and, since the filing and adoption of this survey and estimate were necessary

prerequisites to the letting of the contract for the construction of the road, it follows that the decree of the lower court will be affirmed.

*Affirmed.*

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QUINN v. ALEXANDER *et al.*

[88 South. 170, No. 21389.]

1. SUBROGATION. *A surety paying a judgment has all the equities of the judgment creditor.*

A surety paying a judgment against himself, his principal, and another, has, under section 3785. Code of 1906, Hemingway's Code, section 2911, all of the liens and equities therein that the judgment creditor had both against the surety's principal and the other person against whom the judgment was rendered.

2. BILLS AND NOTES. *Indorser's name need not be noted as indorser on execution of judgment on note against maker and indorser who has also guaranteed payment.*

Where a judgment is rendered on a promissory note against the maker and an indorser who has also guaranteed the payment of the note, the indorser is not within the requirement of section 4015, Code of 1906, Hemingway's Code, section 2577, that "The clerk or justice of the peace shall indorse on all executions issued on judgments rendered in suits on promissory notes and bills of exchange the names of the makers, drawers, acceptors, and indorsers, so as to designate the order in which they are liable," etc.

APPEAL from chancery court of Bolivar county.

HON. G. E. WILLIAMS, Chancellor.

Suit by Mrs. Vallie B. Quinn against D. C. Alexander and others to enjoin the sale of property under execution. A temporary injunction was dissolved, and complainant appeals. Affirmed and remanded.

*Somerville & Somerville, for appellant.*

It is the contention of opposing counsel that the sheriff should not consider the rights of an endorser unless the clerk had first endorsed thereon the fact that a certain person was endorser and counsel refers to the word "such" before the word "execution" in section 4015. Our reading of this section is that the sheriff in making the money out of the property of the maker before the endorser is just as much bound as is the clerk. The section of the code simply says that "In suits on promissory notes" the clerk shall make a certain endorsement. It then says that the sheriff, or other officer, shall make the money on such executions out of the property of the maker, etc. If the sheriff has an execution based upon a judgment in a suit on a promissory note, as in this case we see existed, and the sheriff has already been enjoined by this endorser, and the sheriff knows, and admits, that he knows all of the facts and parties in interest; and if the attorneys for the endorser stand there pointing out to him the property of the maker and request him to levy upon it; then we think clearly the sheriff is bound by the section of the code, bound more by his own knowledge and the circumstances of the case than he would be by the mere endorsement on the execution. Our reason for saying so is that in the present instance we have shown so plainly to the court that the sheriff, Tonkel and Alexander were merely trying to pervert the decision of the courts, and pervert the law, and they all knew it.

Opposing counsel then state that appellee, Tonkle, did not pay the money to the sheriff acting under sections 4015 and 4016, but that he acted under section 3735 which is broader in its scope. We call the particular attention of the court to this part of the brief of our adversaries just filed. Referring to section 3735 and its broad scope, they say that the "Surety not being limited to the benefits of its provisions as against parties who are liable only to him as the rights of endorsers are limited by section 4016."

We cannot see this otherwise than an admission that if sections 4015 and 4016, have any application our entire position in this suit is well taken. We read the above sections to cover all suits involving promissory notes and can see nothing in the said sections to keep them from covering all suits on promissory notes, and this certainly is such a suit.

Counsel then re-argue the fact that Mrs. Quinn had an adequate remedy at law under section 3735. Counsel may think for the moment that this remedy was adequate, but we cannot see it that way. In the first place if Mrs. Quinn was entirely relieved from liability by the payment of the money by Tonkel she should take advantage of this situation while it existed. She was vigilant in this as in all other respects. Had she paid the money over she could not then have possibly been in as good situation as if the money had been paid by the surety for the maker. In other words if her liability had ended she could not afford to pay out anything. In the next place, as argued in our recent brief, if sections 4015 and 4016 apply and if the law is to be enforced then the execution being enjoined as it was, was the only remedy which could make the supposed officers of the law carry out the law.

*Roberts & Hallam*, for appellee.

Replying to the brief for appellant in response to the memorandum by the court, we have only to say: First: There is not in this record any showing that relief was thought of or asked under the provisions of section 3737 of the Code of 1906. And counsel for appellant very frankly concede this when they say "There are, therefore, no allegations of the bill of complaint justifying any recovery under section 3737." The letters at pages 55 and 58 of the record to which counsel make reference bear date respectively, April 13, 1917, and April 24, 1917—six months before the execution herein enjoined issued. The date of this execution, as alleged in the bill was October 10, 1917.

125 Miss.]

Brief for Appellee.

The letter of April 13, 1917, in which reference is made to an affidavit, therefore, did not refer to the present writ, and it fails to disclose the nature or contents of such affidavit or the purpose for which it was made or delivered.

Nor is there any reference in the bill to sections 4015 or 4016, tho counsel say the entire bill is predicated upon those sections. They attempt to relieve themselves from this omission to refer to the sections by contending that the bill sets up the facts and that under the facts the law applicable should be applied. But the bill does not recite any facts such as are referred to in these sections or which bring the case within them. The writ of execution in question bore no endorsement of the clerk of the names of the makers and endorsers so as to designate the order in which the parties were liable. The clerk could not have made this endorsement without usurping the functions of the court. The judgment did not so designate the order of liability. Hence the sheriff had no option in the matter but to levy on the property of both defendants in the execution, or either defendant, if property to levy on could be found. And these omissions were due, not to the neglect of duty on the part of the court, the clerk or the sheriff; but solely to the negligence of the appellant in failing to make timely application to see that the judgment truly recited her liability, if as she contends, her liability was other than that of a principal, and to her failure to protect her interest otherwise as the law provides. Under section 4015 the sheriff was directed to make the money out of the property of the makers on such executions, executions endorsed by the clerk designating the order in which the parties were liable. And so section 4016 cannot be relied on, because it must be taken and construed in conjunction with the preceding section, and because it has reference only to such an execution, an execution so endorsed by the clerk. It must also be remembered that Tonkel, as surety, in paying the judgment was not acting under sections 4015 and 4016, but under section 3735 which is broader in its scope, the surety not being there in limited to the benefits of its pro-

visions as against parties who are liable only to him, as the rights of endorsers are limited by section 4016.

By section 4016, the rights of the endorser in the cases therein mentioned are specifically provided for by incorporating into that section for the benefit of endorsers the rights of the surety under the chapter entitled Principal and Surety. Therefore, the execution enjoined failing to recite the liability of the parties, it became necessary for the endorser to pursue the method provided for the surety in said chapter in order to entitle him to claim the benefits of the same. The appellant did not do this. This gave her a remedy at law, simple, full, adequate, complete. She could not refuse to avail herself of it and then apply to a court of equity for relief against her own neglect; for protection against herself. It is quite true, as suggested by counsel that equity will not suffer a wrong to be without a remedy, but the wrong must not be one's own; and it is equally true, and more applicable here, that equity aids the vigilant, not those who slumber on their rights.

SMITH, C. J., delivered the opinion of the court.

The appellant seeks by an original bill in equity to enjoin the sheriff of Bolivar county from selling her property under an execution on a judgment. She was granted a temporary injunction, but it was afterwards dissolved, and from the decree dissolving it an appeal was granted to this court to settle the principles of the case.

It appears from the record that in November, 1909, Alexander executed to the appellant a promissory note payable on demand, which was thereafter sold by the appellant to the First State Bank of Shaw; she guaranteeing the payment thereof by the following memorandum written on the back of the note above her signature:

"I guarantee payment of the within note, including interest and attorney's fees, waiving presentment for payment and notice of protest."

Alexander having failed to pay the note, W. G. Hardee, the receiver for the First State Bank of Shaw which had become insolvent, instituted an action at law thereon in the circuit court of Bolivar county against both Alexander and the appellant herein, and recovered a judgment against them. A separate appeal from this judgment was taken to this court by each of the defendants, each executing a separate appeal bond, and in due course the judgment of the court below was affirmed and a judgment rendered in this court in favor of Hardee, receiver, against the appellants, and the sureties on their two bonds. Neither the judgment rendered in the court below nor the one rendered here on appeal sets forth that Alexander was the maker of the note and that the appellee was the payee therein, or that either of them was the principal debtor. Execution was issued on this judgment by the clerk of the court below, and it was paid by Tonkel, one of the sureties on the appeal bond executed by Alexander, and thereafter another execution was issued on the judgment for Tonkel's benefit under the provisions of section 3735, Code of 1906, Hemingway's Code, section 2911. The sheriff was proceeding under this execution to sell property belonging to the appellant when he was enjoined from so doing as herein before set forth.

The contention of counsel for the appellant is that the action in which the judgment on which the execution was issued was rendered was on a promissory note on which the appellant was an indorser and liable only in event it cannot be collected from Alexander, from which one of two results must follow: (1) That when Tonkel paid the judgment he did only that which he had guaranteed his principal, Alexander, would do, and, consequently, in so far as the appellant is concerned the judgment has been discharged and Tonkel can look only to Alexander, the principal in the bond on which he was surety, for payment; or (2) that under section 4015, Code of 1906, Hemingway's Code, section 2577, the clerk of the court below should have noted on the execution that Alexander was the maker and

the appellee an indorser on the note sued on, and that the sheriff should not levy on property of the appellant until the property of Alexander has been exhausted without the judgment being satisfied.

First. That Tonkel was a surety on Alexander's, and not on the appellant's appeal bond, is of no importance here, for section 3735, Code of 1906, Hemingway's Code, section 2911, does not provide that a surety paying a judgment rendered against his principal "shall have all the liens and equities" which the creditor in the judgment has against the surety's principal but that he "shall have all the liens and equities" which the creditor has in the judgment.

Second. Placing on one side the fact that the judgment on which the execution was issued does not designate the character of the parties defendant therein, and that the clerk issuing the execution did not note the character in which they were sued on the execution, and leaving out of view the questions argued in connection therewith, section 4015, Code of 1906, Hemingway's Code, section 2577, can have no application here, for in so far as Hardee, the receiver for the First State Bank of Shaw, to whose rights Tonkel has been subrogated, the appellant's liability, because of the guarantee executed by her to the bank, became fixed by the failure of Alexander to pay the note, and in so far as the rights of the judgment creditor are concerned, her liability is that of a principal debtor. *Tatum v. Bonner*, 27 Miss. 765; *Baker v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274.

*Affirmed and remanded.*

## MOBILE &amp; O. R. Co. v. STRAIN.

[88 South. 274, No. 21752.]

1. ADVERSE POSSESSION. *Adverse occupation of railroad right of way for ten years gives title.*

Where a stranger in title to a railroad company obtains adverse, open, notorious, and exclusive possession of a part of its right of way and so occupies it for a period of ten years, claiming it as his own, he thereby obtains title by adverse possession.

2. ADVERSE POSSESSION. *User of railroad right of way and cultivation of garden under claim of title gives title after ten years.*

Where the owner of property fences in a part of a railroad right of way immediately adjoining his property and continuously uses it and cultivates it as a garden, claiming title thereto, and has exclusive possession of it for a period of ten years, he acquired title thereto by adverse possession.

3. ADVERSE POSSESSION. *Permissive use of right of way personal, and permission ceases when permitted party sells his adjoining property in connection with which permission given.*

Where the owner of a hotel by permission fences an adjoining lot which is a part of the right of way of a railroad company, this permissive use of the right of way is personal and ceases when the hotel is sold; and title by adverse possession may be obtained of this lot by remote grantees of the property by exclusive, open, notorious, and adverse possession thereof under claim of title for a period of ten years. This possession is constructive notice of their adverse claim to the railroad company.

4. ADVERSE POSSESSION. *Title may be obtained to part of railroad right of way not necessary to business as common carrier.*

Section 184 of the Constitution of 1890 makes railroads public highways. Title by adverse possession may be acquired of a part of its right of way not in actual use, and not necessary for the transaction of its business as a common carrier.

APPEAL from chancery court of Lee county.

HON. A. J. MCINTYRE, Chancellor.

Suit by the Mobile & Ohio Railroad Company against C. R. Strain. From a decree dismissing the bill, plaintiff appeals. Affirmed.

W. D. & J. R. Anderson, for appellants.

We contend that under the undisputed facts and circumstances (being the agreed facts of this case) the claim and possession of Strain and those thru whom he claims title never began to be adverse in the true sense of the law until the railroad company needed this property for railroad purposes, which the agreed facts show was only a very short time before the bringing of this suit.

Here we have a case where, according to the agreed facts, adverse possession began presumably "with the consent of the Mobile & Ohio Railroad Company officials" and it may be fairly and reasonably presumed (in fact we do not see how it could be doubted) that Robertson fenced up the garden and used it as a garden with the consent of the officials of the railroad company, who were taking their meals with him every few days. The agreed facts show that from that time up to shortly before the bringing of this suit no official of the railroad company had any actual knowledge of any adverse claim of this garden by any owner of the Johnson Hotel property.

We say under the circumstances the holding and possession of Strain and those thru whom he claims title up to the time this property was needed for railroad purposes to build this industrial track on, was permissive and not adverse and hostile.

Counsel on the other side contended in the court below, and the court so held, that this question was settled adversely to the railroad company by *Wilmot v. Y. & M. V. R. R. Co.*, 75 Miss. 374 and *Parton v. Y. & M. V. R. R. Co.*, 76 Miss. 536.

The language used by our court in these cases must be confined to their facts. In each of these cases the question involved was whether title by adverse possession could be acquired against the railroad to a part of its right of way in the country, where the claimant of such title took possession and cultivated the right of way in crops continuously for more than ten years claiming title thereto.

It is true that in both of these cases our court held that title by adverse possession could be acquired, but we call the attention of the court to some of the language used in each of those cases. In the Paxton cases among other things the court said: "The railroad company does not lose its title to the right of way by mere nonuser, and the running of the trains is a constant assertion and occupancy of its right of way to its full extent as granted, so as to preclude a loss of it except by strictly hostile possession of it for more than ten years." (76 Miss. 537.)

In the Wilmot case among other things the court said: "Such occupancy by the owner of the fee must be strictly exclusive, and under distinct color of right, in order to bar the entry of the railroad company. It should distinctly appear that the owner of the fee is not attempting to exercise his use of the land in harmony with the right of the railroad company, but his occupancy must be distinctly hostile to that of the company. If the owner of the servient estate should cultivate any part of the right of way, under the notion that he was only enjoying a legal right not inconsistent with the use of the way by the company, such cultivation, however long continued, could not ripen into a title to the right of way or to the part so cultivated; but if he should fence a part of the right of way against the company itself, and claim, to the knowledge of the company, a right to use it as his own, discharged of servitude of the company, or under circumstances that necessarily gave the company notice of such claim, and should continue such possession for ten years, the company would be debarred of all right." (76 Miss. 374.)

We call the attention of the court especially to the language of court in the Wilmot case to the effect that this claim of title and occupancy relied on must be distinctly hostile to the claim of the railroad company.

We say that we have no such case here. We have here possession evidently beginning with the consent of the railroad company; and altho the agreed facts show that many

years afterwards such possession became adverse, still it is further shown that such adverse possession and claim was never brought to the attention of the railroad company until it needed this property for railroad purposes, which was only a very short time before this suit was brought.

We ask the court to consider the authorities on this proposition from the courts of other states. Under the deed from Reese to the railroad company, the latter had only an easement in the lot in controversy, for it is distinctly stipulated in his deed that the consideration was to build a depot house on said land. We believe under such circumstances that the great weight of authority is that title by adverse possession cannot be acquired until the railroad company has actual notice of the hostile claim. That any possession by another under such conditions is presumptively permissive and the statute of limitations does not begin to run until the railroad company needs the property for railroad purposes, and has actual notice of the hostile claim.

It may fairly be inferred from the agreed fact that Robertson bought the Johnson Hotel property and as an inducement thereto had an agreement and understanding with the officials of the railroad company that the railroad would patronize his hotel as a railroad eating house and that this agreement on the railroad's part was carried out soon after Robertson moved into the hotel building, and that during the period of time that he was clearly operating under this agreement with the railroad company he enclosed and cultivated the land in this controversy as a garden in connection with this hotel. This agreed fact in and of itself would naturally lead to the conclusion that in as much as the railroad was co-operating with Robertson in the conduct of the hotel business by furnishing the hotel with patronage from its trains, that this fencing up and using of the garden would necessarily carry with it the presumption that this plot of land was being fenced up and used by the consent and permission of the railroad company. The court will further note that

the agreed statement of facts say: "Presumably, this garden was used in connection with the hotel, presumably with the consent of the Mobile & Ohio Railroad officials." This presumption which is agreed to as a part of the facts in this case would necessarily continue throughout all time until rebutted by some positive act on the part of the possessor of said garden spot. The fact that it was fenced does not come to the aid of appellee in support of his claim of adverse possession for the reason that the agreed statement of facts says that this fencing is presumed to have been with the consent of the railroad, and the burden is upon appellee to show such acts of adverse holding as would in and of itself necessarily put the railroad company upon notice that appellee's holding and that of his predecessors was adverse. We contend that the recitals in the deeds of title that conveyance of the hotel property included gardens, etc., is not such an act as would put notice upon the railroad of adverse holding. The most that can be contended by these recitals is that it would be constructive notice. This does not come up to the standard of adverse holding required by the decision of the court in the *Paxton* and *Wilmot* cases, *supra*.

In as much as the M. & O. Railroad Company had a deed of record to the land in this controversy, it was not incumbent upon the railroad whenever the hotel property was conveyed from one person to another to go and examine the deed to ascertain whether or not it attempted to convey any of its property. There is no presumption that owners of property adjoining me in the sale thereof would include my property, and there has never been a law that would make it incumbent upon me to examine their deeds for the protection of my own property. The railroad had a right to presume that the conveyances of the hotel property would convey the hotel property alone, and could not be bound by any recitals in the deed attempting to convey its property until it had actual notice thereof, and the fact that the railroad company did not know that this garden plot was being included in the different conveyances to the

hotel property is not evidence of negligence or laches on its part sufficient to estop it from asserting its right to the possession of this land.

To sustain this proposition we refer to the following authorities; Also 63 En. 745, 2 L. R. A. (N. S.) 272; *A. G. S. Ry. Co. v. McWhorter* (Ala.), 80 So. 839; *Dulin v. Ohio R. R. Co.* (W. Va.), 80 S. F. 145; *Roberts v. Sioux City R. R. Co.*, 73 Neb. 8, 102 N. W. 60, 10 Ann. Cas. 992, and Notes, 2 L. R. A. (N. S.) 272; *Louisville R. R. Co. v. Frank*, 100 Tenn. 209, 43 S. W. 771, 66 Am. St. Rep. 752; *Pritchard v. Lewis*, 125 Wis. 604, 104 N. W. 989, 110 Am. St. Rep. 873, 1 L. R. A. (N. S.) 565 and note; *So. Pac. Ry. Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522; *Mo. R. R. Co. v. Watson*, 74 Kan. 494, 87 Pac. 677, 14 L. R. A. (N. S.) 592; *McLucas v. St. Joseph R. R. Co.*, 67 Neb. 603, 93 N. W. 928, 97 N. W. 312, 2 Ann. Cas. 715 and notes.

*Sam H. Long*, for appellee.

This court is bound by the ruling of our supreme court in the case of *Wilmot v. Yazoo & Mississippi Valley Railroad Company*, 76 Miss. 374, and *Parton v. Railroad Company*, 76 Miss. 536, in which the court held that adverse possession could run against a railroad in the usual manner and in the usual and customary mode of acquiring possession, etc., and this opinion as stated above, is in line with the best reasoning and majority of opinions of all the appellate courts of all the different states.

What notice is necessary against a railroad company? In the statement of facts in this cause, the complainant has set out in the agreement that no actual notice was ever given the Mobile & Ohio Railroad Company by any owner personally that they held this land adverse to the claim of the Mobile & Ohio Railroad Company. It would seem that counsel for complainant has been misled in believing that where the property of a railroad company is involved, that some extra form of notice or some special form of notice is necessary to put the railroad company on notice that the party in possession of their property holds it adversely and hostile to their interests, i. e., that some other means

besides enclosing it, putting improvements on it or living thereon and asserting title thereto, to the world, is necessary. We think counsel is entirely wrong in this contention or view, if he holds such, and would cite, to show as our reasons for thus stating what we think the law to be as in an exhaustive and a late note on the character of notice necessary to the railroad company of adverse possession to its property in 1917, Ann. Cas., page 1274. In the first part of this note, it is clearly stated to be the law that the usual and ordinary mode of taking possession, improving and enclosing and such kindred notices, are sufficient.

On an examination of the cases cited under the note to this case we find that each and every case cited under it has to do with the original grantor holding possession of the land after he has granted the right of way; or has to do with some of his heirs or grantees holding possession to the right of way, through his title, and does not involve the rights of any stranger to the land in any way, or that the right of way across the land, is an easement instead of being in fee simple and the courts generally hold in these cases, that the parties have the right to go on and use their land in any way they see fit, until it is necessary for the railroad to use their easement and that anything that is done, that is not inconsistent with the easement, will not be considered as notice to the railroad company that defeat their easement. For instance, *Dulin v. Ohio River Railroad Company*, cited above, in this brief, is also cited in this note, and same does not apply as it is cited under same, but decides that special acts have to be done, where the right of way is an easement across the land of party who asserts adverse possession to same. It has no effect upon the running of the statute against railroads whose rights of way are owned by them in fee, or where the contendor is a stranger to both estates.

Also in *Graham v. St. B. & S. F. R. R. Company* (cited in the note), is distinguished from the case at bar by the following language of the court: "The distinction between a vendor and a stranger in such a case relates to the char-

acter of evidence necessary to show the possession was adverse. If the parties are strangers in title, possession and the exercise of acts of ownership are in themselves, in the absence of explanatory evidence, proof that the holding is adverse, where, if the vendor, after having executed deed, continues to remain in possession, the natural and reasonable inference, in the absence of evidence to the contrary would be that he holds in recognition of the rights of the person to whom he has conveyed; it not being supposed, from mere acts of possession and ownership not inconsistent with the rights of the vendee, that the vendee intends to deny the title he has conveyed. See also note in 1916 B. L. R. A. 657.

I will attempt in the next division of my brief to apply this law developed in division 1 and 2 to the facts in this case.

It is contended, first, that the railroad company at the inception had an easement merely in the land but a careful reading of the deed from Reese to the railroad company will show that he deeded them this land, not for the purpose of putting a depot on same for the railroad company's benefit but that in consideration of the railroad company putting the depot on his land and near his property, he was deeding them the land to have and to hold, etc. There is no reservation for depot purposes but the title to the land was deeded in order to get a depot on it. The court can take judicial knowledge that this kind of a bargain is frequently made by an ambitious landowner for a town-site on his property where railroads are being constructed.

But if appellant is right in its contention and the deed merely conveys an easement, appellee is not the holder of the servient estate. The deed to Robertson, the grantee, through whom appellee claims were made to Robertson and on record before the deed to the railroad company was made and while truly they both hold from a common grantor still the grantors through whom appellee claims were strangers to the servient estate at the time the easement if any existed at all, was created. Robertson's deed

is dated July 6, 1868, and recorded July 6, 1868, and the railroad company's is dated July 14, 1868, and recorded May 31, 1868.

So the principal of special notice by the owner of the servient estate to the owner of the easement or notice by acts not consistent with the easement before the statute can begin to run does not apply, as appellee and his grantors are strangers to the servient estate. It is next contended that because in the agreed statement of facts it is stated that the fence was put there in 1898 presumably with the consent of the railroad company, that this made it incumbent upon the appellee to show that at some time the appellee or his line of grantors had given special notice to the proper officials of appellant that they were going to hold the title adversely from thereon. In the first place this word "presumably" shows that there is no evidence either way and the fact that it is presumed shows that it is uncertain. Counsel for appellant contends that this presumption must be overcome by some special notice still the agreed state of facts are that and since 1891 and for about thirty years, Strain, the defendant, and those through whom he claims title to said Johnson Hotel property, have claimed this garden (which is the lot involved in this cause) as a part of said Johnson Hotel property, and have been in open and notorious adverse possession thereof claiming title thereto. The defendant, Strain, and his grantors since 1891, have not known that this complainant laid claim to the land involved in this cause.

So unless there is some grounds for special notice, such as the Railroad companys' title being an easement and being attacked by the grantees of said Reese, since the easement was created, then the notice necessary and the requirements necessary are the same as would be required against an individual and certainly nothing more strenuous would be required than thirty years open notorious possession claiming title. And if it is stated elsewhere in the statement of facts that the occupation was presumably started by consent, still if it is agreed later that for thirty years appellee and his grantees have been in open and

notorious possession claiming title, this of itself overcame the presumption.

The agreed statement of facts shows further that appellee and his grantors have included this garden in their deeds, one to the other, and place same on record since 1891 and that the man who deeded same in 1891 had owned it sixteen years and it can be fairly presumed that he had always considered it his and he acquired title just six years after the fence was put there which is another fact which tends to show that the occupation was not by sufferance at its inception.

All of these deeds were notice to the railroad company that the appellee and his grantors held the land adversely and considered it as their own. See cases entered in note to *Atlantic Coast Line Company v. Wades*, in 1917A, Ann. Cas., page 1276, 26 Ohio Circuit Court Report 44, said cases being *Smith v. Railroad Company* and *St. Louis & Santa Fe Railroad Company v. Ruttan*, 118 S. W. 705.

SYKES, J., delivered the opinion of the court.

The appellant railroad company by bill in the chancery court seeks to confirm its title and remove therefrom as a cloud thereon the alleged pretended claim of title of the appellee, C. R. Strain, to a certain lot or piece of ground situated in the town of Tupelo. The answer of the defendant, Strain, denies the title of the complainant railroad company and claims title to this land because of the adverse, open, notorious, and continued possession of the land under claim of title by himself and his predecessors in title for a period of about thirty years. The case was tried on pleadings and an agreed statement of facts, and the bill of the complainant was dismissed, from which decree this appeal is prosecuted.

The uncontradicted facts shown by the record material to this decision are as follows: On July 7, 1868, Mayfield Reese sold to Samuel M. Robertson a certain lot in the city of Tupelo, designated as the Johnson Hotel property.

On the 14th day of the same month and year, or seven days after the Robertson conveyance, Mayfield Reese conveyed to the Mobile & Ohio Railroad Company certain lands within the city of Tupelo. The consideration recited in the deed was the building of a depot house by the railroad company on this land. The lot in controversy was a part of the land conveyed by Reese to the railroad company. It is situated immediately south of and adjoining the Johnson Hotel property. The depot is almost due west of the lot in controversy. The tracks of the railroad are between the depot, the Johnson Hotel property, and the lot in controversy. The hotel property and the lot in controversy are about fifty feet east of the main line track of the railroad company. It is agreed that the railroad company has a perfect record title to this lot and that Strain has no title to it, unless he has acquired it by adverse possession.

The record further shows that before the deed of conveyance from Reese to Robertson, under some sort of an agreement of purchase Robertson had erected upon this land a hotel and had made some arrangement with the officials of the railroad company for trains to stop at the hotel for meals, and this hotel was thus used for two or three years. A part of the agreement is as follows:

"No garden was inclosed and cultivated in connection with said hotel until 1868. In 1868 said Robertson, presumably with the consent of the Mobile & Ohio Railroad Company officials, many of whom took their meals at his hotel from time to time, inclosed the lot here in controversy just south of said hotel lot for a garden, since which time it has been continuously inclosed and used as a garden in connection with said hotel property. . . . The exact time in 1868 that said inclosures were made being unknown, but such inclosure was early enough to make a garden. . . . That the inclosure of the garden was by picket fence, and same remained in place for a period of forty-seven years, continuously, until the present structure was put there in 1915."

The agreement further states that before 1891, the deeds to the hotel property did not include the lot in controversy. Again:

"Since 1891 the deeds to said Johnson Hotel property in addition to describing the same as set out in the deed from Reese to Robertson, describe in varying language 'grounds, garden, stable lot, and attached lands belonging to said hotel.' "

Again: "The grantor of the Johnson Hotel property, who first made a deed and added to the description the language 'grounds, garden, stable lot, and attached lands belonging to said hotel,' had owned the Johnson Hotel property for sixteen years prior to 1891; and in making said conveyance he pointed out as a part of the Johnson Hotel property this particular garden adjoining said hotel property on the south which is the property involved in this cause. Said grantor pointed out said garden as a part of the land he intended to convey by his deed and which he claimed to own. This character of conveyance of said Johnson Hotel property has continued down to and including the conveyance to the defendant, Strain; and since 1891, and for about thirty years, Strain, the defendant, and those through whom he claims title to said Johnson Hotel property, have claimed this garden (which is the lot involved in this cause) as a part of said Johnson Hotel property, and have been in the open, notorious, adverse possession thereof claiming title thereto."

During the whole of the time from 1868, the grounds in controversy have been fenced and used as a garden by the owners of the hotel property. During all of this time various and sundry officials of this railroad company, including the president, have frequently visited Tupelo and had an opportunity of observing the continued open and notorious possession of this lot by the owners of the Johnson Hotel property. Since 1891 neither Strain nor his grantors have known that the railroad company laid claim to this lot. It is further agreed that during the time that Strain and those through whom he claims title had been

in possession of this property no official of the railroad company having anything to do therewith had actual notice of this claim and possession, and no other notice of it than through the deed records of the county and the opportunity of notice through the visits of the officials of the company to Tupelo; that the officials having anything to do therewith had no occasion to look into the title of the lot until just before this suit was brought, at which time it was deemed advisable by the railroad company to build a side track for a coal company over a part of this lot; that this coal was to be shipped from other states to Tupelo, and the track was to be built for the purpose of increasing the interstate commerce of this railroad; that previous to this time this lot had not been needed for railroad purposes by the appellant company. The agreement also shows that the appellant railroad was granted lands by the United States for the purpose of building a railroad under an act of Congress approved March 3, 1849 (9 Stat. 772), and confirmed by the Mississippi legislature in 1852 (Laws 1852, chapter 1); that a large part of the appellant's side tracks and branches are built on the lands above granted by Congress and the state of Mississippi, but the particular land in controversy in this cause was not included in said grants; that none of the lands within the corporate limits of Tupelo was acquired under the federal land grant.

It is the contention of the appellant that the holding and possession of this lot by Strain and those through whom he claims was not adverse and hostile until the time the property was needed by the appellant company upon which to build this side track; that up to this time this possession was permissive. Appellant relies on this clause of the contract, namely:

"In 1868 said Robertson, presumably with the consent of the Mobile & Ohio Railroad Company officials, many of whom took their meals at his hotel from time to time, inclosed the lot here in controversy just south of said hotel lot for a garden, since which time it has been continuously inclosed and used as a garden in connection with said hotel property."

This agreed statement of facts, however, further shows that this land continued to be used as a garden by all of the subsequent grantees of Robertson, and that the first grantor who included this garden in his deed in 1891 had been in possession of this property for sixteen years and pointed out this garden as a part of his property which he claimed to own. The agreement then recites that:

"This character of conveyance . . . has continued down to and including the conveyance to the defendant Strain, and since 1891, and for about thirty years, Strain, the defendant, and those through whom he claims title, . . . have claimed this garden as a part of the said Johnson Hotel property, and have been in the open, notorious, adverse possession thereof, claiming title thereto"—and further that since 1891 Strain and his grantors have not known that the appellant company claimed title to this lot. From this agreement it is apparent that the appellee and his predecessors in title certainly from 1891 have exercised all of the rights of ownership possible to this lot. They have been in the exclusive, open, notorious possession thereof, claiming title. Their deeds to this lot were also on record. The only thing that could possibly have been done by them which was not done was actually notifying the appellant company through the proper officials of their claim to this property. The original possession of Robertson to this lot presumably with the permission of the railroad officials as to its duration is not shown. This permission, however, under this statement was purely a personal one to Robertson, and it cannot be presumed from this that his remote grantees were only exercising this permissive possession. Especially is this true in view of the fact that the party who sold the land in 1891, and who had been in possession of it since 1875, by deed included this land, and explained to his vendee that he owned it, and from 1891 to the present time these vendees both through their recorded deeds and their acts *in pais* have exercised the very highest degrees of ownership over this land that are susceptible of being so exercised.

While both the appellant and the appellee claim title through a common source, namely, Mayfield Reese, the Johnson Hotel property proper was first sold to Robertson before the railroad company purchased its lands. It is not necessary for us to decide whether the railroad company's deed from Reese was a fee-simple grant or merely an easement, as we are not here presented with a case of a grant to a railroad company of a right of way and a subsequent claim by the grantor or by those claiming under him of title by adverse possession to part of the right of way. The cases cited in the brief of the appellant upon this proposition are mostly cases of this latter character, an example of which is that of *Railroad Co. v. McWhorter*, an Alabama case, 202 Ala. 455, 80 So. 839. In that case there was a grant of an easement to the railroad company, and it was held that the possession of the grantor or his successors in title of a portion of the right of way not being actually used by the railroad could not be adverse to the railroad. In that case it was further held that the grantee of the easement could use the entire strip if necessary or proper for the purpose of the grant, but that it could not exclude the grantor, unless for such purposes. In this case the appellee is not claiming the lot in controversy through any grant from Reese; consequently he is a stranger to the title claimed by the railroad company. See, also, *Roberts v. Railroad Co.*, 73 Neb. 8, 102 N. W. 60, 2 L. R. A. (N. S.) 272, 10 Ann. Cas. 992. The decision in this latter case is briefly summed up in the concurring opinion wherein it is said that the occupancy of a portion of the right of way of the railroad company by the owner of the servient estate was not inconsistent with the easement.

In the case of *Graham v. Railroad Co.*, 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344, it is stated that:

"The distinction between a vendor and a stranger in such a case relates to the character of evidence necessary to show that the possession was adverse. If the parties are strangers in title, possession and the exercise of acts

of ownership are, in themselves, in the absence of explanatory evidence, proof that the holding is adverse; whereas if the vendor, after having executed deed, continues to remain in possession, the natural and reasonable inference, in the absence of evidence to the contrary, would be that he holds in recognition of the rights of the person to whom he has conveyed."

This doctrine is approved in the case of *Railroad Co. v. Ruttan*, 90 Ark. 178, 118 S. W. 705. See, also, note to case of *Railroad Co. v. Dawes*, Ann. Cas. 1917A, 1274.

In this state, contrary to the holdings in some of the states to which reference has above been made, it has been held that the owner of a servient estate can cultivate the right of way only with the consent of the railroad company, and that the occupancy of the right by the railroad is practically exclusive. *Wilmot v. Railroad*, 76 Miss. 374, 24 So. 701. It is further held in this case that the owner of a servient estate may acquire title to parts of the right of way by adverse possession. In that case it is held that:

"Such occupancy by the owner of the fee must be strictly exclusive, and under distinct color of right, in order to bar the entry of the railroad company. It should distinctly appear that the owner of the fee is not attempting to exercise his use of the land in harmony with the right of the railroad company, but his occupancy must be distinctly hostile to that of the company."

It is also further said in speaking of the owner of the fee: "But if he should fence a part of the right of way against the company itself, and claim, to the knowledge of the company, a right to use it as his own, discharged of servitude of the company, or under circumstances that necessarily gave the company notice of such claim, and should continue such possession for 10 years, the company would be debarred of all right." *Wilmot Case, supra*.

To the same effect is *Parton v. Railroad Co.*, 76 Miss. 536, 24 So. 536.

Under the statement of facts in this case, the permissive possession of Robertson of this lot being purely personal,

ceased when Robertson gave up possession of the hotel property and certainly since 1891 the appellee and his grantors through their open, notorious, exclusive, and adverse possession of this property claiming title thereto, together with their recorded deeds, was constructive notice to the appellant of this claim.

It is next contended by the appellant that title to this lot cannot be acquired by adverse possession for two reasons: First, because section 184 of the state Constitution provides that "all railroads which carry persons or property for hire shall be public highways, and all railroad companies so engaged shall be common carriers;" second, because this railroad company is what is termed a "federal land grant railroad," and under the act of Congress above referred to "the said railroad and branches shall be and remain a public highway, for the use of the government of the United States, free from toll or charge upon the transportation of property or troops of the United States;" that under this act it is also made a public highway charged with the duty of transporting free of charge property and troops of the United States.

First. Section 184 makes railroads public highways. There are, however, many differences between a railroad right of way and streets and public roads. The rights of the public to the use of the streets and public roads cannot be lost by adverse possession. *Whitherspoon v. Meridian*, 69 Miss. 288, 13 So. 843; *Briel v. City of Natchez*, 48 Miss. 423; *Vicksburg v. Marshall*, 59 Miss. 563. When a street or public road is used for purposes other than those to which the land is dedicated, the right of the people themselves, the right of the public generally, is affected by such use, and the people in such cases cannot be thus deprived of their rights. We do not think this rule is applicable, however, to a part of a railroad right of way which is not in actual use. The right of way, in a sense, is a public highway, and the land acquired therefor, either by purchase or condemnation proceedings, though devoted to a public use, is the private property of the railroad corpora-

tion. The officers of this company are not public officers. The objects and purposes of the corporation, though public in a sense, are also private; it is operated for gain, for the benefit of the stockholders. Streets and public highways belong to the sovereign or to the people; they are created for this purpose, and not for the private benefit of any individual or corporation. These differences are well expressed in the opinion of the Alabama Supreme Court in the case of *Warehouse & Storage Co. v. Railroad Co.*, 182 Ala. 516, 62 So. 745. Quoting from that opinion:

"Sovereign rights are not necessarily involved in the use of a portion of a railroad right of way for private purposes. While there might be, and sometimes is, such an obstruction of a railroad right of way as to constitute a public nuisance, the one in question is not such an obstruction or use. The wrong here complained of is private and not public."

Just as in the case at bar, for the proper operation of the railroad it is not necessary that it have possession of this lot, which is fifty feet from its main line track. The very fact that it has not used this lot since 1868 is conclusive of the fact that it is not necessary for the operation of the railroad.

To those lands of a railroad company not actually necessary for the operation of the railroad title by adverse possession may be acquired. The authorities in other states upon this question are divided, as may seem by reference to the following reports: Note in 87 Am. St. Rep. 766; 2 Ann. Cas. note, page 718; *Dulin v. Railroad Co.*, 73 W. Va. 166, 80 S. E. 145, L. R. A. 1916B, 653, Ann. Cas. 1916D, 1183, and note, note to the same case in L. R. A. 1916B, 657.

The questions decided in the *Paxton and Wilmot Cases*, *supra*, arose after the adoption of the Constitution of 1890, but it does not appear from the briefs of counsel or from the opinion of the court that section 184 of the Constitution was expressly called to the attention of the court.

Second. Since the lot in controversy was not acquired either through the United States or the state of Mississippi, but was purchased from a private individual, and since this lot is not necessary for the use of the railroad company in transporting the troops or property of the United States, the grant from the government or the tenure by which it holds title to these lands from the government or the state and whether or not title by adverse possession can be acquired as to any of these lands granted by the government or the state is not presented by this record.

The decree of the lower court is affirmed.

*Affirmed.*

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RAMSAY v. RAMSAY.

[88 South. 280, No. 21673.]

1. CONTEMPT. *Witnesses. Rights of defendant in contempt proceedings stated.*

In a proceeding for contempt prosecuted for the purpose of punishing an alleged contemner for disobeying an order or decree of the court, he is entitled to be informed by the petition, motion, or information by which the proceeding was begun of the nature and cause of the accusation, cannot be compelled to testify against himself, and should be presumed innocent until proved guilty beyond a reasonable doubt.

2. CONTEMPT. *Punitive sentence for disobedience improper in proceedings to compel obedience.*

A punitive sentence appropriate only in a proceeding to punish for disobedience of an order or decree of the court cannot be imposed in a proceeding prosecuted to compel obedience to an order or decree made to enforce the rights of a party to the suit.

3. CONTEMPT. *Punitive sentence may be imposed only after opportunity to defend.*

A punitive sentence in a proceeding for contempt can be imposed only after the contemner has been given an opportunity to appear and defend his alleged disobedience of an order or decree of the court.

On suggestion of error. Sustained.  
For former opinion, see 87 So. 491.

SMITH, C. J., delivered the opinion of the court.

The appellant suggests and we are of the opinion that we erred in not setting aside the fifty dollar fine imposed on the appellant by the court below.

"Proceedings for contempt are of two classes: (1) Those prosecuted to preserve the power and vindicate the dignity of the court, and to punish for disobedience of its orders; and (2) those instituted to preserve and to enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and to administer the remedies to which the court has found them to be entitled." 13 C. J. 57.

In the first of these classes the punishment is for a past offense, and when imposed must be suffered in the absence of executive clemency. In the second the contemner "can end sentence and discharge himself at any moment by doing what he had previously refused to do." *Gompers v. Buck's Store & R. Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

The first class is *quasi*-criminal, and a defendant therein should be informed of the nature and cause of the accusation (*Grace v. State*, 108 Miss. 767, 67 So. 212), cannot be compelled to testify against himself, and should be presumed innocent until proved guilty beyond a reasonable doubt (*Gompers v. Buck's Store & R. Co.*, *supra*). Placing on one side the question of the propriety of combining the two classes of contempts in one proceeding, the case at bar comes solely within the second of these classes, for the petition by which it was begun contains no allegations set-

ting forth special elements of contumacy on the part of the appellant; consequently his refusal to pay the alimony must be treated as being rather in resistance to the appellee than in contempt of the court. *Gompers v. Buck's Stove & R. Co.*, *supra*. Moreover, the petition contains no prayer for the punishment of the appellant, but simply that he be coerced into the payment of the alimony.

The distinction between the two classes of proceedings for contempt was not called to our attention on the former hearing, was overlooked by us when considering the judgment to be rendered, and the cause was then decided in accordance with the rules governing proceedings for contempts of the second class.

The fine cannot be sustained on the ground that it was imposed for the purpose of coercing the appellant into paying the alimony as the future installments thereof become due, and not as a punishment for a past offense; for the appellant is entitled to be heard in defense of his failure to pay the alimony each time he is charged therewith before being fined or imprisoned either as a punishment therefor or in order to coerce him into paying the alimony.

The decree hereinbefore rendered by this court and also that rendered in the court below will be set aside, and a decree will be entered here in accordance with that rendered in the court below, with the omission of the fifty dollar fine and the provisions thereof omitted in our former decree.

*Suggestion of error sustained.*

WASHINGTON COUNTY v. YAZOO & M. V. R. CO. *et al.*

[88 South. 284, En Banc, No. 21572.]

RAILROADS. *Foreclosure of mortgage extinguishment of stockholders' rights.*

Where a railroad company has issued bonds, the payment of the interest and principal of which are secured by a mortgage on its franchise and property, and default is made in the payment of the interest, and under the terms of the mortgage the franchise and property are sold, all rights of the stockholders in the railroad are by this foreclosure sale lost and destroyed.

APPEAL from chancery court of Issaquena county.

HON. J. G. MCGOWAN, Acting Chancellor.

Suit by Washington County against the Yazoo & Mississippi Valley Railroad Company and others. Decree of dismissal, and complainant appeals. Affirmed.

*Walton Shields* and *Manyard & Fitz Gerald*, for appellant.

*C. N. Burch*, *H. D. Minor*, *E. A. Smith*, *W. S. Horton*, *Blewett Lee* and *Percy & Percy*, for appellees.

No brief found in the record for either side.

SYKES, J., delivered the opinion of the court.

In this suit Washington county seeks to have the Yazoo & Mississippi Valley Railroad Company held as trustee of one thousand shares of stock in this railroad for the benefit of appellant, and that this appellee railroad company be required to issue the stock to the appellant county, and, further, for an accounting for dividends and other moneys which may be due the county. There were various amendments and also an amended bill filed by the appellant (complainant) in the court below. An elaborate an-

swer was interposed by the defendant (the appellee railroad company), and the cause was heard on these pleadings and proof consisting of depositions, oral testimony, and record proof. There is also a kindred suit against this same appellee filed by the city of Greenville in which the city claims five hundred shares of the stock of the appellee railroad company. These bills were dismissed at the final hearing by the chancellor, and from each separate decree an appeal is prosecuted here.

In this opinion we shall deal alone with the appeal of the county, as the principles herein decided are conclusive also of the rights of the city.

It is the contention of the appellant that in equity it is entitled to demand that the Yazoo & Mississippi Valley Railroad Company recognize it as a stockholder in this company to the extent of one thousand shares of the capital stock of the par value of one hundred thousand dollars, and issue to the complainant certificates of stock for this amount, and to account to complainant as such stockholder for dividends and other moneys due; that under the articles of consolidation of the Louisville, New Orleans & Texas Railway Company with the Yazoo & Mississippi Valley Railroad Company, made in 1892, complainant is entitled to this right, because at that time in equity complainant was entitled to one thousand shares of the capital stock of the Louisville, New Orleans & Texas Railway Company of the par value of one hundred thousand dollars; that these one thousand shares of the capital stock of the Louisville, New Orleans & Texas Railway Company to which complainant was in equity entitled at the time of this consolidation were left unissued on the books of the Louisville, New Orleans & Texas Railway Company in 1887, and are the only shares unissued of the four thousand five hundred thirty shares which the majority stockholders of this railway company, who were in control of it, had agreed to issue to themselves under the corporate name of the Financial Improvement Company as a part consideration for the purchase by the Louisville,

New Orleans & Texas Railway Company from them of all of the corporate property of the Memphis & New Orleans Railroad & Levee Company, in which they were also the majority stockholders in control; that there was also a further consideration for said purchase which was certain bonds of the Louisville, New Orleans & Texas Railway Company; that the Financial Improvement Company was a corporation organized to construct the Louisville, New Orleans & Texas Railway Company and its constituent lines, and was, by virtue of the construction contracts under which the various lines of railroad were built, and which were subsequently merged into the Louisville, New Orleans & Texas Railway Company, the owner of all of the stock and bonds of this railway company, and that the Memphis & New Orleans Railroad & Levee Company, which we shall hereafter call, for convenience, the Levee Company, was so constructed; that at the time of the purchase of the Levee Company railroad by the Louisville, New Orleans & Texas Railway Company the Financial Improvement Company, owned all of the stock of the Levee Company, except that owned by the county of Washington and the city of Greenville, the county owning one thousand shares, of the par value of one hundred thousand dollars, and the city owning five hundred shares, of the par value of fifty thousand dollars; that the Levee Company was a corporation on paper only, and had no money, except the bond subscribed to it by the county and city, and was actually constructed, and this construction paid for, by the Louisville, New Orleans & Texas Railway Company and was known as the Leland branch of this railroad. It had fifty-six and fifteen hundredths miles of railroad which connected with the main line of the Louisville, New Orleans & Texas Railway Company at Leland, in Washington county.

The Memphis & New Orleans Railroad & Levee Company was a Mississippi corporation, chartered in 1882 by the legislature of this state. The charter of this company authorized a capital stock of ten million dollars. The county

of Washington issued one hundred thousand dollars of its bonds to this company and received therefor one thousand shares of stock of the par value of one hundred dollars a share.

It is the contention of the appellant that this Levee Company was consolidated with the Louisville, New Orleans & Texas Railway Company, and that under this consolidation proceeding the county was entitled to the same number of shares of stock in the latter railroad, and that upon the consolidation, in 1892, of the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company the appellant was entitled to one thousand shares of the last-named railroad company and to an accounting as above stated.

There are many interesting questions presented by this appeal, all of which have been carefully considered by the court. It is, however, unnecessary to consider but one of these questions, as it is determinative of the case.

It is the contention of the appellee that all of the rights of the appellant company as a stockholder in the Levee Company were wiped out and lost in 1887, when the franchise and corporate property of this company were sold out and foreclosed under a recorded mortgage executed by this company to secure the payment of principal and interest of bonds issued for the sum of one million one hundred and twenty-three thousand dollars. This contention, we think, is sustained by the record.

It is necessary to state more in detail the facts of the case. The Levee Company, in which Washington county was a stockholder, was incorporated in 1882; Chas. P. Huntington and others being the incorporators. The authorized amount of capital stock to be issued was ten million dollars. It nowhere appears from the record whether any other stock of this Levee Company was issued, except the one thousand five hundred shares issued to the county and city. That part of the Levee Company railroad actually constructed was fifty-six and fifteen hundredths miles. This was constructed by the Financial Improve-

ment Company, a railroad construction company chartered under the laws of the state of Colorado. The record is silent as to the contract for construction between the Financial Improvement Company and the Levee Company. From the testimony of Maj. J. M. Edwards, a witness for the complainant, it seems that the franchises and rights or controlling number of shares of stock of the Levee Company were purchased by or for the parties who were constructing the constituent companies of the Louisville, New Orleans & Texas Railway Company, from which answer we infer that by some agreement the stockholders of the Financial Improvement Company acquired control of the Levee Company. The stock of the Financial Improvement Company was owned by R. T. Wilson & Co. and the Pacific Improvement Company. There is nothing in the record to show that any stock, except the one thousand five hundred shares above mentioned of the Levee Company, were issued either before or after it was constructed. In 1885, however, this Levee Company executed to Edward H. Pardee and Albert Crolius, trustees, a mortgage to secure its bonds, and this mortgage was recorded in the deed records of Washington county. The only testimony relating to the issuance of these bonds and the execution of this mortgage to secure their payment is that of Maj. J. M. Edwards, witness for complainant. From his testimony it is evident that the Levee Company had no means of its own, and that the cost of constructing it was borne by the Financial Improvement Company, and that its only method of paying the Financial Improvement Company was with these bonds or with its stock and bonds. This witness only recalls the issuance of these first mortgage bonds for the sum of one million one hundred and twenty-three thousand dollars. Maj. Edwards further testified that he did not remember, and had no way of ascertaining, the actual cost of construction of the Levee Company, neither did he know the value of its corporate property. In 1887 this mortgage was foreclosed and purchased by Chas. M. Calhoun. The deed to Calhoun recites default in the payment of the

interest on the mortgage bonds. The consideration named in the deed is five hundred fifty thousand dollars. Maj. Edwards testified that the object of the bondholders in making this foreclosure sale was to receive the money for their bonds upon which default had been made; that it was not the object of the purchasers under that foreclosure to merge or consolidate the Levee Company with the Louisville, New Orleans & Texas Railway Company. This witness further testified that Chas. P. Huntington was president of the Levee Company in 1883, but that he does not know who the officers were after that date; that he does not know what has become of the books and minutes of the Levee Company; that he does not know what amount of stock was issued by this company prior to the foreclosure; that so far as he knows the only transfer of the interest to the Levee Company made by Chas. P. Huntington or by any one else was by transfer of stock; that when the Levee Company railroad was completed by the Financial Improvement Company, the Financial Improvement Company was paid by the issuance of first mortgage bonds, income bonds, and stock in the Levee Company, but he does not know what stock or what income bonds were issued; the only bonds he knows of are those evidenced by the mortgage. Immediately upon his purchase of the Levee Company, Chas. M. Calhoun executed a deed to it to the Louisville, New Orleans & Texas Railway Company.

It is the contention of the appellant that Calhoun, the purchaser at the foreclosure sale, was really the representative at this sale of the Financial Improvement Company, or the Louisville, New Orleans & Texas Railway Company, or both; that no money was actually paid by him in the transaction; that previous to his purchase it had been agreed between the Financial Improvement Company and the Louisville, New Orleans & Texas Railway Company what amount this railway company was to pay the Financial Improvement Company for the Levee Company; and that all of these agreements were carried out between these companies and their agent or employee, Calhoun.

The record shows that the constituent lines of railroad which, when consolidated, formed the Louisville, New Orleans & Texas Railway Company, were built by the Financial Improvement Company, and that under its contract with the Louisville, New Orleans & Texas Railway Company this construction company received a certain amount of the stock and bonds of the Louisville, New Orleans & Texas Railway Company. There are no books of the Financial Improvement Company introduced in evidence. Some of the records of the Louisville, New Orleans & Texas Railway Company, however, are introduced, and from items appearing therein it seems that the actual construction price of the Levee Company was approximately five hundred and fifteen thousand dollars. The construction price of the Levee Company railroad, as well as of the branches of the Louisville, New Orleans & Texas Railway Company, appear upon the books of the Louisville, New Orleans & Texas Railway Company. The Levee Company was operated by the Louisville, New Orleans & Texas Railway Company from its completion.

It is the contention of the appellant that the Financial Improvement Company, the Louisville, New Orleans & Texas Railway Company, and the Levee Company, though having different charters of incorporation, were virtually owned and controlled by the same people, and, looking through form to substance, constitute, in reality, the Louisville, New Orleans & Texas Railway Company; that the attempted foreclosure of the Levee Company was, in reality, but a consolidation of this company with the Louisville, New Orleans & Texas Railway Company because the Financial Improvement Company was, in reality, the owner of both lines; that the receipts from the operation of the Levee Company were commingled with those of the Louisville, New Orleans & Texas Railway Company; and that there were sufficient earnings from this company to have paid the interest on these bonds, and therefore there was, in reality, no default in the payment of the interest upon the bonds.

The bonds of the Levee Company were issued and the mortgage to secure them was executed before the Louisville, New Orleans & Texas Railway Company began the actual operation of trains upon this line. The record does not show any contract between the Levee Company and the Louisville, New Orleans & Texas Railway Company as to this arrangement. There are no books, papers, or records of any kind of the Levee Company introduced in testimony. It is presumed that they are lost or have been destroyed. There are no records of any character whatsoever of the Financial Improvement Company introduced. These records have been lost or destroyed. Only partial records of the Louisville, New Orleans & Texas Railway Company have been introduced. We do know, however, that the Levee Company was a Mississippi corporation, a separate and distinct corporation from the Financial Improvement Company a Colorado construction corporation, and the Louisville, New Orleans & Texas Railway Company. The three are separate and distinct corporate entities. These three corporations may have had the same stockholders and bond owners. The dominant spirits of the three may have been the same. From the testimony in the case and the partial records of the Louisville, New Orleans & Texas Railway Company, however, it cannot be said that these three corporations really constituted but one corporation; neither can it be said that the mortgage of the Levee Company to secure the bond issue of one million, one hundred and twenty-three thousand dollars was a fraudulent mortgage to secure a fictitious indebtedness; neither can it be said from this testimony that there were no defaults in the payments of the interest due on these bonds. The only witness who testified in the case, Maj. Edwards, a witness for the complainant, testified, in effect, that the bonds were issued to the Financial Improvement Company in payment for the construction of the work; that there was a default in the payment of the interest thereon and a sale of the road to

Calhoun. It makes no difference whether Calhoun purchased for the Financial Improvement Company or for the Louisville, New Orleans & Texas Railway Company. Either of these corporations had a right to purchase at this foreclosure sale. This sale took place in 1887. The deed to Calhoun and the deed from Calhoun to the Louisville, New Orleans & Texas Railway Company were promptly placed of record in Washington county. About thirty years elapsed from the recording of these deeds to the institution of this suit.

The records of the Louisville, New Orleans & Texas Railway Company indicating the cost of the Levee Company and that it was paid by the Louisville, New Orleans & Texas Railway Company do not overcome the recitals of the mortgage and deeds and the testimony of Maj. Edwards to the effect that the mortgage was given in good faith to secure this bonded indebtedness, and that there was a default in the payment of the interest on the bonds. In other words, the complainant has failed to show a fraudulent or fictitious mortgage and foreclosure sale, and therefore has failed to show a consolidation of the Levee Company with the Louisville, New Orleans & Texas Railway Company. By this foreclosure all rights of the stockholders in the Levee Company were lost. The record shows that by virtue of its agreement with the Louisville, New Orleans & Texas Railway Company the Financial Improvement Company became the owner of a large number of shares of the Louisville, New Orleans & Texas Railway Company, and that this company voluntarily offered the county and city to have issued to them in exchange for their stock in the old Levee Company a corresponding number of shares of stock of the Louisville, New Orleans & Texas Railway Company. Neither the county nor the city ever agreed to this exchange or called for this stock. The Financial Improvement Company under its contract with the Louisville, New Orleans & Texas Railway Company never called for the issuance by the railway company of this stock, but, it seems, informed the officials of the Louisville, New Or-

leans & Texas Railway Company that it would be issued in exchange for this old Levee Company stock held by the county and city. This was merely an unexpected voluntary offer on the part of the Financial Improvement Company, which offer was never accepted. So far as this record discloses, the Financial Improvement Company is a defunct corporation. Its voluntary offer is not binding upon the appellee, which is in every way a stranger thereto. It is therefore our conclusion that the rights of the county as a stockholder in the Levee Company were destroyed by the foreclosure sale in 1887. The learned chancellor so decided, and his decree is affirmed.

*Affirmed.*

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MINOR v DOCKERY.

[88 South. 321, No. 21797.]

1. ANIMALS. *Statute imposes absolute liability on owner of trespassing stock.*

Under the stock law contained in chapter 50, Code of 1906 (chapter 102, Hemingway's Code), the owners of the domestic animals therein named are required to fence such animals against the crops, and crops may be cultivated on uninclosed lands; and section 2222, Code of 1906 (section 4541, Hemingway's Code), being part of said stock law, makes the owner of trespassing stock absolutely liable for damages done by them to the crops of others, and questions of due care and negligence in confining stock are eliminated.

2. ANIMALS. *Agent in control of trespassing stock not liable for damages.*

A mere agent in control of the cattle, horses, and mules belonging to his principal is not liable for damages done by such animals in trespassing upon the crops of another, under the principle that an agent is liable to no one except his principal for damages resulting from an omission or neglect of duty in respect to the business of the agency.

APPEAL from circuit court of Adams county.

HON. R. L. CORBAN, Judge.

Action by Octavia Dockery against Duncan G. Minor. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

*Engle & Laub*, for appellant.

These cattle alleged to have trespassed on the lands of appellee were in the direct charge of employees living on the Fatherland Place and the appellant was a mere intermediate agent between the owners and these employees.

The instructions given by appellant were to keep up the cattle and to keep up the fences. Appellee cites the case of *Bileu v. Paisley*, 4 L. R. A. 840. That case under the facts of this case is authority for the appellant. See Opinion pages 843-844 and quotations therein from *Brown v. Lent*, 20 Vt. 529.

Appellant also makes an effort to apply the rule announced in *Montgomery v. Handy*, 62 Miss. 16, to the facts in this case. In the *Montgomery v. Handy* case, the defendant who was sued for the trespass, owned some of the cattle in the common enclosure and voluntarily permitted the cattle of another to mingle and run with his own and as it would be difficult to distinguish under the circumstances whether his cattle or the other cattle he allowed to mingle with his did the damages, then it was reasonable for the court to hold that he was an owner for that one particular occasion or as the court puts it an owner *pro hoc vice*. But the court did not depart from the language of the statute in our state that the owner is liable for the damage but simply held the defendant under the peculiar facts of the *Montgomery v. Handy* case, to be an owner for all intents and purposes.

It is clear that appellant as this intermediate agent took all reasonable steps to prevent the cattle getting out and trespassing. We respectfully submit that this case should be reversed and dismissed and judgment rendered for appellant.

*Ratcliff & Kennedy*, for appellees.

The assignments of error as to the instruction given this appellee and the instructions refused appellant have really to do with the proposition of law as to whether or not the person having possession or control of the animal will be liable for damages or is the liability confined simply to the owner? Appellant contends that the liability is regulated by section 2222 of the Code of 1906, which says: "Any owner of cattle . . . shall be liable in damages for all injuries. . . ."

This immediate proposition was disposed of in the case of *Montgomery v. Handy*, 62 Miss. 16, in which an action was brought for the destruction of crops by animals. The defendant resisted liability; that there was not a common enclosure, a question not pertinent to the issue here, and that he was not liable for the destruction of any crops done by his brother's stock since the section referred to makes only the owner of the stock responsible, which he stated these cattle were not.

The facts were that the defendant in the reported case permitted his brother to drive a number of cattle onto the defendant's place, and both the defendant's cattle and his brother's cattle readily passed over into the land of the plaintiff and damaged their crops. In passing upon the defense, CHALMERS, J., said:

"Neither position is sound—he was equally responsible for damage inflicted by the stock of his brother, which by permission, had been mingled with his own. It is true that the statutes speak of the owner only as being responsible and it is true also that penal statutes are to be strictly construed. But that the defendant was liable for the damage inflicted by all the stock voluntarily mingled with his own seems too plain for argument. If he was not, he would have been equally acquitted for damage done by a hired animal though hiring was for the whole year, since in

either case it might have been argued that he was not the owner of the animals; in either case he was the owner *pro haec vice* and must be so treated. 1

This decision of our own court, to our mind, disposes of the question at issue, but, again, in the case of *Knott v. Brewster*, 27 So. 758, a plaintiff sued defendant for damages to his crops by defendant's cattle or cattle in his charge; the defendant, among other things, plead that he did not own any cattle. A peremptory instruction was given in the lower court and TERRELL, J., reversed the case, and stated that it was a question for the jury.

"Liability for the trespass of animals is imposed not because of ownership but because of possession, and of the duty to care for them. Accordingly, one who has the use, care and control of cattle, although not their absolute owner is liable for their trespasses." 3 Corpus Juris, p. 144, sec. 452.

In the case of *Bileu v. Paisley*, 18 Or. 21; 4 L. R. A. 840, it was held: "That the manager of sheep, who was not the owner thereof, is responsible to a third party for actions of the herders employed by him, although the acts were done without his knowledge or authority and contrary to his direction."

Under our statute, any person having possession of, or control of, cattle, is the owner *pro haec vice* under section 2222 imposing liability upon any owner for damages for all injuries committed by such animals.

Negligence of the owner, or person having possession, is not a prerequisite to the liability. There is liability in a stock-law district when it is shown that certain cattle did certain damages, and it is not incumbent upon a plaintiff to show that there was negligence attending the trespass of the animals; it is the absolute duty of a person having possession of an animal in a stock-law district to keep the same within an enclosure and not to permit it to escape.

The court properly refused the following instruction requested by the defendant: "The court instructs the jury

that if they believe from the evidence that stock other than the Fatherland stock got into the fields or crops of plaintiff, and they are unable to determine just what damage was done by the stock in possession or control of the defendants, that they should find for defendant."

There was no evidence that any stock other than the Fatherland stock got into the fields of plaintiff and did any of the damage for which this suit is brought. However, if stock in the possession or under the control of the defendant, other than Fatherland stock, did do some of the damage, the defendant was, of course, liable, and the instruction would have been properly refused. No doubt, counsel intended said instruction to refer to stock other than stock under the possession and control of defendant, but the instruction was not so worded, and was properly refused.

We respectfully submit that this cause should be affirmed.

ANDERSON, J., delivered the opinion of the court.

Appellee, Miss Dockery, plaintiff in the court below, sued the appellant, Minor, defendant, in the circuit court of Adams county, for damages alleged to have been done the crops growing on her land by the cattle, horses, and mules belonging to the appellant, during the years 1917 and 1918, and recovered judgment, from which appellant prosecutes this appeal.

Appellee alleged in her declaration that the stock which damaged her crops were owned by, or under the control of, appellant. The evidence showed without conflict that they were the joint property of the mother of appellant, Mrs. K. S. Minor, and her brother, Jas. Surget, and that the only interest appellant had in them was as agent of his mother and uncle in the capacity of manager of the Fatherland place, owned by them, on which their stock which did the alleged damage were situated, and from which it is charged they strayed onto appellee's place.

Appellant asked an instruction, which was refused by the court, directing the jury to return a verdict in his favor; and he requested, and the court refused, three other instructions, in which it was sought to direct the jury to return a verdict for appellant if they should find from the evidence that he did not own the animals alleged to have done the trespassing, but merely had control of them as the agent of the owner.

It was agreed and made part of the evidence in the case that Adams county was under what is known as the "Stock Law," which is contained in chapter 50, Code of 1906 (chapter 102, Hemingway's Code).

Under the provisions of this statute the domestic animals therein named are fenced against the crops, and the crops are cultivated uninclosed. And the owners of trespassing stock are made absolutely liable for all damages done by such stock. Questions of due care and negligence in confining stock are eliminated. The statute (section 2222, Code of 1906; section 4541, Hemingway's Code), provides that, "Every owner of . . . shall be liable," etc.

It is contended on behalf of appellant that there is no liability on his part for the trespass, because the stock were owned by others, and he had control of them as their agent; that under the terms of the statute imposing absolute liability only the owners are made liable; and that regardless of the statute a mere agent would not be liable under the common law, and to sustain this contention *Feltus v. Swan*, 62 Miss. 415, is relied on. In that case the court held (and the principle is supported by the authorities, and in our judgment is sound) that an agent is liable to no one except his principal for damages resulting from an omission or neglect of duty in respect to the business of the agency.

On the other hand, it is contended for the appellee that appellant, as agent in charge and control of the stock for his mother and uncle, was owner *pro hac vice*; and under the authority of *Montgomery v. Handy*, 62 Miss. 16, was

liable for the damages resulting from their trespassing. In our opinion this contention is unsound. The facts of that case, as stated by the court in its opinion, were as follows:

“Plaintiff and defendant, and also one Ayres, made their several crops under one fence within a common inclosure. In the fall of the year, and before their crops were gathered, the defendant, Handy, without consultation with his neighbors, inclosed his own crop on three sides, leaving the fourth side to be completed by his immediate neighbor, Ayres, who already had a very insufficient fence between the land of himself and that of Ayres. Upon his own land Handy’s cattle were already located and he permitted those of his brother also to be driven thereon. Both his own and his brother’s cattle readily passed over the insufficient fence into the land of Ayres, and thence, of course, into that of plaintiff, Montgomery, and greatly damaged her crop.”

On this question the court said: “He was equally responsible for damage inflicted by the stock of his brother, which by permission had been mingled with his own. It is true that the statute speaks of the ‘owner’ only as being responsible, and it is true also that penal statutes are to be strictly construed. But that the defendant was liable for the damage inflicted by all the stock voluntarily mingled with his own seems too plain for argument. If he was not, he would have been equally acquitted for damage done by a hired animal, though the hiring was for the whole year, since in either case it might have been argued that he was not the ‘owner’ of the animal. In either case he was the ‘owner’ *pro hac vice*, and must be so treated.”

Under the facts of that case it will be seen that the defendant became a bailee of his brother’s cattle by permitting them to be driven into his inclosure and mingled with his; and that is what the court held. A bailee is the owner *pro hac vice* of the subject of bailment. An owner *pro hac vice* has some interest or title in the property. As a bailee, he would be such an owner. But a mere agent, in

charge of personal property for his principal, is not the owner in any such sense.

It follows from these views that the court below should have given the peremptory instruction requested on behalf of appellant and refused by the court.

*Reversed and remanded.*

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ILLINOIS CENT. R. CO. v. KING.

[88 South. 322, No. 21787.]

1. CARRIERS. *May contract to carry articles though no tariff rate filed; liable for loss of jewelry though no tariff rate filed; "Public highways;" "Common carriers."*

Under section 184 of the state Constitution of 1890, and under section 4839, Code of 1906 (section 7624, Hemingway's Code), railroads are common carriers and public highways over which persons have a right to ship articles not dangerous to persons or other property; and a railroad may contract to carry articles though it has filed no tariff rate with the State Commission, and where it accepts jewelry and other articles of special value it is liable for their loss resulting from dishonesty or negligence of its employees.

2. CARRIERS. *Agent's failure to specify all articles in bill of lading held waiver of nonliability clause.*

Where a shipper carries articles of freight to a freight agent of a railroad company in charge of its business, and discloses the nature and value of the articles to be shipped by freight, and such agent writes only one article in the bill of lading when the shipment contains many articles, the company cannot escape responsibility for the negligence or dishonesty of its employees because the bill of lading contains a clause that "no carrier will be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariff, unless a special agreement to do so and the stipulated value of the articles are indorsed hereon." Where the information is furnished the agent in charge, and he fails to write the data on the bill of lading, it must be treated as having waived the provision.

125 Miss.]

Brief for Appellant.

APPEAL from circuit court of Attala county.

HON. T. B. CARROLL, Judge.

Action by T. J. King against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*May & Sanders*, for appellant.

The box in question was delivered to, accepted by, and receipted for by appellant as crockery. Instead of containing crockery only, the box, according to plaintiff's testimony and the jury's verdict, actually contained articles of jewelry. The rule is firmly established that if a shipper is guilty of any fraud or imposition in respect to the carrier as by concealing or mis-stating the value or nature of the article, he cannot hold the carrier liable beyond the apparent value or character, as stated by him, since he has deprived the carrier of the compensation of which it is entitled, and has caused it to relax its vigilance in carrying the goods of exceptional value. The authorities which sustain this rule, are collated in an extensive note to the case of *Harrington v. Wabash Railroad Company* (Minn.), 23 L. R. A. 21 N. S. 745, et seq., and in the monographic note appended to the case of *Ellison v. Adams Express Company* (Ill.), 1915A, L. R. A. (N. S.) 502 et seq.

Appellee sought to avoid the application of this rule by undertaking to prove a special contract, resulting by implication from alleged facts stated by the shipper to the carrier's agent to the effect that the shipper advised the agent that the box contained articles of exceptional value, in the form of heir looms, jewels, etc. This effort on the part of appellee cannot succeed first because the written contract cannot be varied or contradicted by parol testimony, as to a contemporaneous verbal agreement; and second, because such alleged verbal agreement was not endorsed on the written contract, and without such endorsement the verbal agreement could not bind the carrier under the express language of bill of lading in paragraph 6,

above quoted; and third, because the verbal agreement, even if endorsed on the written contract, could not bind the carrier, as such contract was prohibited by the classification and tariffs of the carrier.

The way bill and bill of lading both show that this shipment was received and handled subject to the published classifications and tariffs of the carrier.

If the shipment in question had been an interstate movement it must be conceded that no right could grow out of the alleged contract, and no obligations could be imposed by it, because it was in conflict with the supreme legislative authority of the country, and would, therefore, be illegal and void. A clear statement of the rule applicable in such case may be found in the case of *Cicardi Bros. Fruit Produce Company v. Pennsylvania Company*, 213 S. W. 533, reading as follows: "Under the act (Elkin's Act) a published tariff so long as it is in force, has the effect of a statute and is binding alike on carrier and shipper. *Pennsylvania Railway Co. v. International Coal Co.*, 230 U. S. 184-197, 33 Supreme Court 893, 57 Law Edition, 1446, Ann. Cas. 1915A. 315. And with respect to the service, as fixed by the filed regulations applies not only to rates, but also to other stipulations relating to service and facilities within the purview of the act. *Southern Railway Company v. Prescott*, 240 U. S. 632, 36 Supreme Court 469, 60 Law Edition 836."

In the case of *Pacific Fruit and Produce Company v. Northern Pacific Railway Co.* (Washington), 180 Pac. 854, it is said: "A carrier in interstate commerce can enter into no contract of transportation for which there is not express authority in its filed and published tariffs. See, also, *T. & P. Railroad Co. v. American Tie Co.*, 234 U. S. 138, 34 Supreme Court, 885, 58 Law Edition, 1255; *Planing Mill Company v. Railroad*, 112 Miss. 148, 72 So. 884."

The decided cases emphatically declare that the tariffs, so long as they are in effect, have the same binding force as legislative enactments, and unless authority can be

found in the tariffs for making a special contract, none can be made, and they are adjudged to be contrary to public policy, and are therefore, held to be illegal and void, as declared by our own court in the *Planing Mill case*, *supra*.

That state statutes similar to the Mississippi statute, *supra*, must be relied upon as defining the rights of the shipper, and the obligations of the carrier has been declared in the following cases: *Mollahan v. A. T. & S. F. Railway Company*, 154 Pac. (Kansas), 248; *State v. I. & N. Railway Company*, 72 So. (Ala.), 494; *Goodnow Coal Co. v. Northern Pacific Railway Co.*, 162 N. W. (Minn.), 519; *Leiper v. Baltimore & Pacific Railroad Co. et al.*, 105 Atl. (Penn.), 551.

We submit that these authorities and cases referred to in the opinions of the court must convince this Honorable court that the classification and tariffs must be followed in the execution of any binding contract, and any contract ignoring the classification and tariffs must be held illegal and void, and otherwise the tariffs and classification would fail to serve the public interest as intended by the legislative authority.

That the so-called contract here involved did not follow the classification and tariffs is conceded in the testimony, as well as appearing on the face of the contract itself.

The contract, which was made, as shown by the bill of lading was a legal contract made in conformity to the tariff, and this contract was not breached. It described the shipment as crockery and no crockery was lost. The illegal contract sought to be shown by parol testimony ignored the tariff and undertook to bind the carrier to transport articles in violation of the tariff provisions. Thus, we have evidence in this record showing the execution of a perfectly valid and binding contract which was fully performed, and evidence tending to establish an illegal and void contract, which was not performed. The judgment was rendered against the appellant, as for breach of the illegal contract.

We respectfully submit that the only judgment, which could have been properly rendered was a judgment sustaining the legal contract, and since the legal contract was not breached, there could be no recovery.

Summing up our contentions, we maintain that the oral testimony to vary and contradict the bill of lading was incompetent under the unbroken chain of decisions of this state, governing the introduction of parol testimony to contradict a written instrument.

Even if parol testimony was properly admitted to establish a special contract, the special contract was not executed, unless and until it was endorsed on the bill of lading, and this was not done. The special contract could not have been executed under any circumstance, because such contracts were prohibited by the classification and tariffs of the carriers, on file with the Mississippi Railroad Commission and the Interstate Commerce Commission, at the time this shipment moved.

It necessarily follows from these contentions that the judgment of the court below should be reversed and suit dismissed.

*S. L. Dodd and Mayes & Mayes, for appellee.*

There are a great many authorities holding that it is unlawful for a railroad company to accept for interstate shipment any article for which there is not a fixed rate given in the published tariffs provided by the interstate commerce commission. But all of these decisions turn upon a special provision of the interstate commerce Act; and the authority for so holding in the case of interstate shipment is found in the interstate commerce Act, which act, of course does not apply to intrastate shipment, such as the one involved here that act and the decision thereunder cannot be resorted to by this court in determining what would be the liability of the railroad company in the case at bar.

By the terms of the interstate commerce act, railroad companies are especially forbidden to transport any arti-

cle for which there is not an approved and published rate; but there is no such inhibition in the Mississippi laws relating to intrastate shipments.

The provisions of interstate commerce act above referred to is as follows: "No carrier, unless otherwise provided by this act shall engage or participate in the transportation of passengers or property as defined by this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor extended to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

There is no such provision as this in the Mississippi laws. It is true that section 7627 of Hemingway's Code, impose upon the railroad company the duty of filing their rates or tariffs with the railroad commission and to submit to a revision and approval of the same; but neither this section nor any other section forbids the railroad company to accept freight for the transportation of which no rate has been published. If the railroad company has been remiss in its duty to name and submit to the commission and publish a rate for transporting jewelry, its neglect in that regard cannot be imputed to the shippers of jewelry nor can they in any wise be penalized for the same and deprived of their right to recover from the railroad company the value of their property which has been stolen while in transit.

We beg to call the court's attention to the fact that while it is true our opponents are in court contending that the published tariffs, number (2), forbids the transportation of jewelry by freight, yet there is nothing in the record upon which to base such a contention. In the first place tariff number (2) has not been introduced in evidence in this case and is not to be found in the records, and therefore this court has no means of knowing what tariff number two (2) forbids and what it permits; and in the second place, even if there was anything in the tariff number two (2) as, promulgated by the railroad commission, which

forbids the transportation of jewelry by freight, such a provision would have absolutely no force or effect in law, and that is true because the statute laws of the state, which are of no higher dignity than the rules of the railroad company and the orders of the railroad commission, expressly provided that the railroads are public highways over which all property has an equal right to be transported. Even if the railroad commission had ruled that railroads should not transport an article in intrastate shipment for which there was no published rate, that ruling would be in conflict with section 7624 of Hemingway's Code.

So, the court will see that our opponents are wrong when they say that the railroad company could not lawfully accept this jewelry for intrastate shipment. On the contrary, it could not lawfully decline to accept it. Therefore, our opponents' contentions are wholly untenable. They showed that tariff number two (2) did not contain a rate on jewelry, but there was no proof that tariff number two (2) or any other tariff or any order of the railroad commission or any statute relating to intrastate shipments forbid the shipment of jewelry by freight, but that on the contrary, the general statutes forbid the railroads companies to decline to ship it.

It was contended by the railroad company in the court below that King had made misrepresentation to the depot agent as to the contents of the box and that owing to these misrepresentations the railroad company was prevented from taking such precautions as would have prevented a robbery and that because of those misrepresentations and the consequent inability of the railroad company to know the danger and to guard against the loss, King will be deprived of all right to recover for the lost articles. But these contentions of our opponents cannot be maintained here in view of the decision of the Mississippi supreme court in the case of *M. J. and K. C. R. Company v. Philips and Company*, and the proven fact of the case at bar.

In the case of *M. J. and K. C. R. Company v. Philips*

and Company, 60 So. 572, our court said: "A misrepresentation by a shipper as to the contents of a freight shipment to obtain lower rates did not invalidate the contract of shipment nor prevent a recovery from the carrier for the loss of the shipment, where such misrepresentation did not contribute to the loss by misleading the carrier as to the precautions required for its safe transportation."

Our opponents next contend that King is trying by parol evidence to change the terms of a written contract; but we say that there is nothing of this kind in this case. The rules about varying written contracts by parol evidence do not apply at all in a case of this kind. It is our opponents' contentions that the word "crockery" as it appears in this bill of lading shows that the railroad company agreed to transport a box containing crockery, and crockery only. But all of the evidence and circumstances of this case shows that such was not the intentions or the limit of the undertaking of the railroad company. The facts of this case are that at the time this box was offered for shipment it was sitting on the floor of the depot right there before King and the depot agent, and that a full and complete statement was made by King to the depot agent in which King advised the depot agent that the box contained crockery, watches, lockets, rings and other jewelry, and the depot agent was then and there informed as to the value thereof; that the depot agent undertook on behalf of the railroad company to transport these articles and all of them safely and to deliver all of them to King at Kosciusko. That when the depot agent undertook to make out the bill of lading giving the shipment it was not his aim to make the bill of lading state the whole contract of shipment to the extent that each and every article composing this shipment would be specifically described and listed in the bill of lading, but for convenience sake and to save time and to serve merely as a mark of identification, the agent, as was his general practice in such case, merely bunched the description and selected the one word crockery as a convenient and sufficient mark of identification

and description of the shipment; and that he, the agent, marked the box "crockery."

Our opponents say next that the shipment of jewelry by freight or the shipment of any article for which there is not a published tariff is especially forbidden by section six (6) of the bill of lading. But as to that our opponents are wrong. In the first place there is nothing in paragraph six, that shows that it was intended to apply to jewelry. Paragraph six is too vague and indefinite in its terms to make it effective at all. The words of section six are:

"No carrier will carry or be liable in any way for any documents, specie or any article of extraordinary value not specifically rated in the published classifications or tariffs, unless a special agreement to do so and the stipulated value of the articles are endorsed hereon."

Of course, jewelry is not documents or specie and cannot be included in those terms. The other term, articles of extraordinary value, is too vague and indefinite to accurately describe anything, because no standard is given for the measurement of the value. Extraordinary value as compared with what? a one hundred ninety-five dollar watch is not of extraordinary value as compared with a one hundred thousand dollar race horse. Since no criterion is given for the measurement of values it cannot be determined whether any specific article, jewelry or what not, is of extraordinary value; and therefore it cannot be said with any degree of certainty that this section six applies to jewelry.

But, be that as it may, section six, if not expressly, does impliedly provide that articles not rated may be transported under special contracts made by the agent. It is true that section six (6) also provides that the special contract should be endorsed on the back of the bill of lading. But it is perfectly manifest that the endorsement of the special contract on the bill of lading is a thing which can be waived by the agent. It is perfectly manifest that the depot agent is the general agent of the railroad company for the purpose of making these special contracts for

the shipment of goods not rated and if he is the general agent for that purpose he may waive the provision about endorsing the agreement on the back of the bill of lading. And, since in this case the depot agent was fully advised of the contents of this shipment and as to the value thereof and agreed that the railroad would receive and transport it safely and he fixed and received compensation therefor on behalf of the railroad company and omitted to endorse this on the back of the bill of lading if such indorsement was necessary, he will be held to have waived the provision as to the endorsement and his principal, the railroad company, will be bound by that waiver.

So in conclusion we say that in view of the established facts of this case as those facts are conclusively established by the verdict of the jury which has settled all conflicting testimony in King's favor and in view of the fact that the proof is conclusive that at the time the box was offered for shipment the depot agent was fully advised as to its contents and as to the value thereof and then received the box for shipment and collected the freight for same, and the company permitted the box to be robbed of valuable articles or lost therefrom, it would be the greatest injustice in this case to deny King the right to recover the value of his lost property.

ETHRIDGE, J., delivered the opinion of the court.

The appellee, King, sued the railroad company for the loss of a package, or the contents from a package, shipped by freight and marked "crochery," which contained jewelry and other articles of value which are not usually shipped by freight. The defendant filed two pleas, one denying that it was guilty of the trespass and wrongs complained of, or any part thereof, and the other denying that it undertook or promised in the manner and form as plaintiff hath complained of.

The principal defense is that the agent of the railroad had no authority to contract so as to bind the company,

because it had no tariff specifically providing for the transportation of jewelry; it being contended that the railroad company was not entitled or authorized to transport jewelry and articles of unusual value by freight, because no tariff specifically providing for transportation charges for such articles had been filed with the Interstate Commerce Commission or the State Railroad Commission. It is also contended that the plaintiff was not entitled to recover because the bill of lading issued to him described the property as "crockery," and there was nothing in the bill of lading to indicate that the box contained articles of unusual value or any other articles than crockery.

The plaintiff testified that he went to the station agent and disclosed to him the true contents of the box and the value of the articles, and asked if he could take and be responsible for the goods, and, if not, that he would have carried them back home, and that the agent told him that he would. The plaintiff testified that the express office was closed, and that with full knowledge of the contents of the box the agent of the railroad company marked the box "crockery." When the box reached Kosciusko, some wire which had been used in wrapping the box had been cut, broken, or removed, and the plaintiff contended that the contents of the box had been removed, at least some jewelry, described in the suit; while the railroad company's agent at Kosciusko contended that, while the box had been apparently opened, or the wire wrapping removed, that he examined the contents of the box at the request of the plaintiff and found each article which plaintiff then contended had been shipped in the box. There was a verdict for the plaintiff for one hundred fifty-six dollars and twenty cents, which was one-half of the amount sued for, and from this judgment this appeal is prosecuted.

The bill of lading under which the goods were shipped contained, among other provisions, the following:

"No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification

or tariff, unless a special agreement to do so, and the stipulated value of the articles are indorsed hereon."

It is contended by the appellant that, inasmuch as the items sued for are not specifically listed in the bill of lading, and inasmuch as the special agreement with the agent was not noted on the bill of lading, that there can be no recovery by reason of this provision of the contract. The appellant relies upon a number of cases predicated upon the Acts of Congress and the tariffs and classifications approved by the Interstate Commerce Commission. Under the federal law applicable to interstate commerce, a carrier is prohibited from carrying any article unless its tariff for so doing has been filed with and approved by the Interstate Commerce Commission. One provision of the Interstate Commerce Act provides:

"No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; . . . nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." U. S. Comp. St. section 8569 (7).

Of course, so far as interstate commerce is concerned, this act controls, and a carrier cannot lawfully carry in interstate commerce articles unless it has filed its tariff with the Interstate Commerce Commission. But the tariffs of the Interstate Commerce Commission and the form of contracts approved by the Interstate Commerce Commission are not binding upon the states as to intrastate commerce.

The shipment in question in this suit moved wholly in intrastate commerce, and is governed entirely by the laws of this state. Under section 184 of the state Constitution, it is provided that:

"All railroads which carry persons or property for hire shall be public highways, and all railroad companies so engaged shall be common carriers," etc.

By section 4839, Code of 1906 (section 7624, Hemingway's Code), it is provided:

"The track of every railroad which carries persons or property for hire is a public highway, over which all persons have equal rights of transportation for themselves and their property, and for passengers, freight, and cars, on the payment of reasonable compensation to the railroad for such transportation; and if any railroad corporation, or person managing a railroad, shall demand and receive unreasonable compensation for the service rendered in the transportation of passengers or freight, or more than allowed by the tariff of rates fixed by the Commission, or by such person or corporation with its approval, or more than the rates specified in a bill of lading issued by authority of the railroad; or if any railroad shall, for its advantage, or for the advantage of a connecting line, or for that of any person, locality, or corporation, make any discrimination in transportation against any person, locality, or corporation, unless authorized by the Commission; or if any railroad company shall charge more for a short haul than for a long one, under substantially similar circumstances and conditions, without the sanction of the Commission, such person or corporation, in either case, shall be guilty of extortion, and may be punished therefor criminally, besides being liable civilly."

By section 4091, Code of 1906 (section 6720, Hemingway's Code), a railroad company in this state has power to do an express business over its line or lines of railroad. Under section 4842, Code of 1906 (section 7627, Hemingway's Code), it is made the duty of every railroad or the common carrier to furnish to the Commission its tariff of charges for transporting passengers and freight, and it is made the duty of the Commission to revise, fix, and regulate the charges so as to allow reasonable compensation to the railroad company for the services to be rendered.

But the railroad company is not prohibited by these statutes from making a contract for the carriage of goods either by freight or express where no tariff has been filed. Of course, it is its duty to file its tariff of charges, as soon as they are fixed, with the Commission for approval and for revision in proper cases. But in case through oversight or for other reason the railroad company has not promulgated and filed a tariff for the carriage of particular articles, it is not prohibited from carrying such articles for reasonable compensation, but under the statutes above referred to making it a highway, it is under obligation to transport any property that may be moved over a highway without danger or damage to other persons or property, for reasonable compensation. It has, by the law of the state, the power to do an express business, and under this, of course, it may move and transport such articles as are usually transported by express, and fix reasonable charges therefor. Such charges, of course, to be subject to revision by the railroad commission. None of the articles involved in the present shipment are prohibited from being transported, and are not dangerous to either person or property, and the railroad company had the right to contract for their transportation.

The station agent represents the railroad company in making contracts for the carriage of property, and we see no reason why he could not make the contract involved here. There is a dispute between the plaintiff and the agent of the defendant as to the facts as to what was said and done at the time the goods were tendered for shipment, and as to their condition when taken from the railroad, and as to the condition of the shipment when inspected by the plaintiff. But all these questions have been settled by a good and lawful jury. The judgment will therefore be affirmed.

*Affirmed.*

ADAMS v. YOUNG *et al.*

[88 South. 324, No. 21805.]

LOGS AND LOGGING. *Timber held to revert to vendors upon impossibility of performance of contract.*

In a timber contract providing that, if at any time it becomes impossible for vendees to cut the timber, it would revert to vendor, the contract becomes invalid, and the reversion arises when it appears that it was impossible for vendees' assignee to cut the timber within a reasonable time, in the manner stipulated.

APPEAL from chancery court of Alcorn county.

HON. A. J. MCINTYRE, Chancellor.

Suit by W. T. Adams against Hubert F. Young and others. Decree for defendants, and plaintiff appeals. Affirmed.

*Boone & Worsham and C. W. Sweat, for appellant.*

The chancellor in his opinion, in discussing the right of the termination of this contract, said: "The contract says upon a failure, or if it was impossible for them to operate the mill and keep this contract, then Dr. McIntyre should have the right to take charge of it and declare it void, and Berryman had nothing to say about it whatever." The above is not a literal quotation from the contract, for the reason that the contract does not provide for the termination thereof by a failure on Berryman's part to cut the timber, but the exact language of the contract, is, "if at any time it becomes impossible for second party to cut said timber from any cause, etc." In other words, nothing would justify the cancellation of the contract except an impossibility on Berryman's part to carry it out; and inasmuch as Adams succeeded to all the rights of Berryman, nothing would justify the cancellation of the contract as to Adams except an impossibility on Adams' part to cut said timber from any cause.

We contend that there is nothing in the evidence to justify the court in finding, nor did the court in its opinion attempt to find that it was impossible for Adams to perform this contract, and that Adams had a right to proceed under this contract early or late, unless, and until the contract was cancelled by proper legal proceedings. It will be observed that the contract does not provide that when Dr. McIntyre shall consider or determine on his own part and for himself that it was impossible for Berryman to cut the timber from any cause, but the fact as to whether or not it was impossible for the Berrymans, and likewise impossible for Adams to cut the timber is a question of fact to be determined by the courts. Dr. McIntyre had no right upon his own *ipse dixit* to determine that the facts necessary to create an impossibility on Berryman's part to cut this timber existed.

Berryman, and likewise Adams, had a right to rely upon the law of the land, and in making their arrangements in determining when they should finish cutting said timber, had a right to rely upon the law touching that question. At the time of the making of these contracts, we find the law of Mississippi to be set forth in the case of *Hines v. The Imperial Naval Stores Co.*, 101 Miss. 807, 58 So. 650, in which case this court had under consideration a lease for boxing timber in which the time within which the boxing must be begun was not specified in the lease and that the boxing did not begin until after the expiration of seven years from the date of the lease; and it was contended by appellant that the boxing must begin within a reasonable time and that seven years is an unreasonable time in which to begin. Judge SMITH, in delivering the opinion, said: "On this point I am directed by my Brethren to say that: The question of the reasonableness of this contract cannot be drawn in question in this proceeding. When a valid contract is once made for, the sale of timber or timber rights which specified no time for the completion of the contract, the court will construe the contract so as to force the completion within a reasonable

time, determinable from all the facts and circumstances surrounding each particular case; but the court will not declare any such contract unreasonable so as to avoid the consequences except on a direct proceeding to cancel." In the above principle of law, however, Judge SMITH did not concur.

We contend that in the light of all the facts and circumstances surrounding this case that Dr. McIntyre could not terminate this contract without resorting to direct proceedings so to do.

*W. D. Conn*, for appellee.

Counsel say, "We contend that there is nothing in the evidence to justify the court in finding, nor did the court in its opinion find that it was impossible for Adams to perform this contract." With this statement we take issue and it is on this proposition we fall back on in case all other contentions fail us. The contract provides as follows: "If at any time it becomes impossible for second party to cut said timber from any cause, then said first party shall have the right to take said timber and make such disposal as he thinks best, and second party shall not have the right to object in any way." On page 21 of the record it is shown that appellant testified as follows: "I tried to get some one to run the mill and cut the timber for me and talked with different people about operating the mill and cutting and hauling the logs to the mill; in fact, we went so far once as to have a deal on for a man to work it and couldn't get a man to saw it. I sent Mr. Savage with a man by the name of Colrey from Rienzi, to make a deal with him to saw this timber for me and I afterwards undertook to make a deal with one of the Colemans to take the mill and saw the timber at a fixed price delivered to the railroad." Appellant further testified, that: "After failing, as above recited, I tried to sell the mill and contract to people who would operate it." Appellant makes the following statement: "Well, it does not make any

difference one way or the other. I bought the mill to operate and cut the timber and when I could not, I decided if somebody would come and cut the timber and pay this price, I would let them have it." Still further on he stated that he proposed to sell out and let the purchaser take over the contract, after he had gotten through his efforts to manufacture.

We confidently ask what more is necessary to establish the proposition that it was impossible for second party to cut the timber within the meaning of the contract. He admits that he never intended to go about the proposition himself. He says he tried to get some one to cut it for him and failed. Then, on cross-examination, he states that he bought the mill to operate and cut the timber and that he couldn't. He did not intend to cut, and began trying to sell out. He had failed; he couldn't and he quit trying; and we submit that if anything on earth is humanly impossible it is for a man to do a thing after he has failed, admitted to himself that he cannot do it, and then quits trying. The very contingency provided for in the contract had happened. Of course, when Dr. McIntyre took the matter in his hands and sold the timber he necessarily assumed the risk of establishing this proposition. But when the other party admits the impossibility over and over again, it seems to us that he occupies an impregnable position. If it is for the courts to determine this question of impossibility, and not for Dr. McIntyre, by his *ipse dixit*, to do it, here is the testimony plain, pointed and uncontradicted, and out of the mouth of the party himself, which ought to make it comparatively easy for the court to decide this question of fact.

It is contended for by counsel for appellant that Dr. McIntyre could not terminate this contract except by resorting to a direct proceeding in court for this purpose. In reply to this contention, we ask what, then, was the purpose of putting into the contract the condition we have just been discussing. Dr. McIntyre had reserved in the contract the right to terminate the contract, under cer-

tain conditions, and also forbade the other party even the right of complaining thereat. Certainly counsel are not serious in this contention. This stipulation evidently was put in the contract expressly for the purpose of avoiding the necessity of resorting to the court to terminate it.

HOLDEN, J., delivered the opinion of the court.

This is a bill in chancery to cancel a claim as a cloud upon the title of complainant to certain timber, and for a perpetual injunction against interference with complainant by appellees in his rights with reference to cutting and removing said timber. The case is here for the second time. Upon the former appeal, styled *Young et al. v. Adams*, 122 Miss. 1, 84 So. 1, this court held that the bill stated a good cause and remanded the case for further answer and proceedings in the lower court.

Upon the second trial of the cause testimony was heard by the chancellor on the question of whether the appellant, Adams, assignee of the Berrymans, had diligently complied with the terms of the timber contract, and whether it had become impossible for him to do so, and thus forfeited his rights to McIntyre, the original vendor in the timber contract between McIntyre and the Berrymans. The bill and contract are set out in full in the former decision, to which we refer as the law of the case.

We have carefully reviewed and considered the testimony introduced before the chancellor by both sides, and deem it sufficient to say, without setting out the evidence in detail, the proof was ample to warrant the chancellor in finding as a fact that the appellant, Adams, by his delay and failure to proceed to cut the timber under the contract, and by his own testimony that he was unable to operate the mill, and consequently it became impossible to cut the timber as provided by the contract, had thereby forfeited all of his rights thereunder. Therefore we think the decree of the chancellor is correct.

The contract, reasonably construed, means that, if the appellant, Adams, who was the assignee from the Berrymans and stands in their shoes, found it impossible to carry out the contract by cutting and removing the timber within a reasonable time according to its terms, then the contract was to become invalid and the timber and all of the rights going with it should revert to the appellee grantor. The contract uses the language:

"If at any time it becomes impossible for second party to cut said timber from any cause, then said first party shall have the right to take said timber and make such disposals as he thinks best, and second party shall not have the right to object in any way."

The evidence shows that this impossibility arose; consequently the right to retake arose.

The word "impossible" was intended to be used in a limited sense and has reference to the time and manner in which the cutting is to be done. However, the testimony in this record is such as to justify the chancellor in deciding as a matter of fact that the appellant had found it impossible to carry out the contract, and had, furthermore, abandoned the purpose of carrying it out and was endeavoring to sell the timber to other persons for several months before the sale to appellees by McIntyre.

The case before us is different from the *Hines Case*, 101 Miss. 802, 58 So. 650, in that no time was specified for beginning or completing the contract in the *Hines Case*, nor was there a provision for retaking the timber upon failure of vendee, but here the contract is obviously different in its terms.

The decree is affirmed.

*Affirmed.*

## LAWSON v. STATE.

[88 South. 325, No. 21617.]

*EMBEZZLEMENT. Proof of fiduciary relation necessary.*

Under indictment for embezzlement, proof of a fiduciary relation must be made before conviction lies for appropriating funds; and where the state's evidence shows no agency or relation of trust, but shows contractual payment of funds by owner to contractor, *held*, that embezzlement is not proven and accused should be discharged.

APPEAL from circuit court of Panola county.

HON. E. D. DINKINS, Judge.

B. T. Lawson was convicted of embezzlement, and he appeals. Reversed and appellant discharged.

*L. A. Smith*, for appellant.

Embezzlement involves the following elements to make out the statutory crime: 1st. It must be shown that the thing converted or appropriated is of such a character as to be within the protection of the statute. 2nd. That it belonged to the master or principal. 3rd. That it was in possession of the accused at the time of the conversion, so that no trespass was committed in taking it. 4th. That accused occupied the designated fiduciary relation. 5th. That his dealing with the property constituted a conversion of it. 6th. That there was a fraudulent intent to deprive the owner of it.

The relation with reference to the two thousand one hundred dollars, if it be not taken to be the first payment on a contract to erect the building, thereby becoming at once the property of Lawson, the appellant, then at most it was merely a loan to him to enable him to finance the purchase of lumber, and in either event he cannot lawfully be convicted of embezzlement on account thereof.

It would be imprisonment for debt, as prohibited by section 30 of our Constitution.

Corpus Juris, page 422, volume 20, says: "If the relation between the prosecutor and accused with reference to the money or property received or held by accused is merely that of debtor and creditor, as where one employed as agent or broker is authorized to mix money received by him with his own, accused is not guilty of embezzlement in using the money for his own benefit. That same work cites *Clark v. State*, 61 Tex. Cr. 539, 135 S. W. 575. In that case the work was to be repairs on the house of the prosecutor, who took a note and lien to secure payment of the note for the advancement made; in the instant case no note was taken and no contract lien, because our laws provide a statutory lien. That is the only difference in the two cases. One would be rather surprised, anyway, to find another case like this one in the law books, does it not appear so? Hence an exact precedent need not be looked for. It appears extraordinary that facts like these should be made the basis of criminal prosecution, and, without doubt, if the Como Church had taken a bond from Lawson for the faithful performance of the contract they would be suing instead of prosecuting.

The nearest to this case that can be found by the author is the above case and also the following: "Where accused agreed, in consideration of a certain sum to endeavor to secure a loan for prosecutor and to return the sum so paid if he failed to procure the loan, his failure to return that sum upon failing to procure the loan did not constitute embezzlement but merely a breach of contract." *Johnson v. State*, 102 Ark. 139, 143 S. W. 593. Statutes making it a crime fraudulently to embezzle and convert trust money do not apply to a case where money is advanced as payment on a contract which the party fails to perform, even tho, he may have intended not to perform the same when he appropriated the money. *Keeler v. State*, 4 Tex. App. 527.

The only trust in this case was that the prosecuting witness trusted that Lawson would perform his contract, trusted his word, but every time a trust in the word or promise of another is disappointed, a crime does not eventuate. That is not the kind of trust the law intends. The fact of the trust itself must be proven beyond a reasonable doubt, clearly, definitely, and to a moral certainty. That was not done in this case, and the author contends that it is very, very, doubtful if the evidence makes out a *corpus delicti*. Embezzlement is a criminal breach of trust, but every breach of trust is not embezzlement. The statutes were not intended to cover every breach of trust, nor even every fraudulent breach of trust, and render it a criminal offense. 20 C. J. 423, and authorities cited in Note 98.

The statutes defining and promoting embezzlement like other penal statutes, are to be strictly construed, and no one can be punished under them, however greivous his wrong, who is not fairly comprehended within their precise language. It is not enough that he may come within the spirit and intent, 20 C. J. 439 and note, citing authorities.

The indictment charged that appellant was the servant or agent of the Como Colored Methodist Church. He was nothing of the sort, he was a contractor who contracted to build a certain building for a certain sum, payable in a certain way, and to complete the work in a certain time. Otherwise, he could and doubtless did have other contracts on which he was working and his time and labor and means and methods were under his own direction and of no one else. A servant is one in the employ of another, where the person so employed is under the control and direction of the employer, and whose duty it is to obey the latter in the performance of the particular service at all times, and in every particular. *Peo v. Treadwell*, 69 Cal. 226, 10 P. 502. An agent is one to whom authority has been delegated to act for and in the name of another, and who is not under his employer's immediate control. In

the instant case, appellant was not an agent because he received the money and as an advance payment on a complete contract bottomed on two necessities, material and labor as well as manager besides. All these he was to furnish in his own way without direction or control from the Como Church in any shape, form or fashion, and the job was a turn key job, and Lawson was not working as an agent of the church, but as an independent contractor, representing himself directly, and not acting on delegated authority from the church to follow their ideas and plans and procedure in the erection of the building, but his own. He was to build a church complete; they to pay for it. Each independent and only obligated to each other under the law of contract. Lawson had no authority to commit them and they had none to commit him; neither had the right to make or discharge obligations for the other; neither had any right to direct or control the other in the performance of their obligations to each other. They could sue for breach of contract and that alone.

The use of the alternative words, servant or agent, and the confusing of the statute embracing agents or servants with that providing for the receiving of something on contract were confusing to the jury and the motion of appellant that the district attorney elect under what head he was prosecuting and thereby make the issue definite and enable him to put his proof on intelligently should have been sustained. It was overruled. 20 C. J. "Embezzlement being a statutory offense the sufficiency of the indictment is to be tested, not by the rule of the common law, but by the requirements of the particular statute upon which it is bottomed. An indictment containing in one count so much of the language of two sections of the statute, of embezzlement as to leave it uncertain which of two different crimes of embezzlement is charged is insufficient." *State v. Messerger*, 58 N. H. 348. Where each count of the indictment leaves it doubtful of which of two crimes defendant is charged, the indictment is demurrable. *Com v. Pratt*, 137 Mass. 98. The trouble in the instant case was that

the indictment contained two charges in the alternative, and the proof put forward another one, and defendant was in the midst of confusion, worse confounded, while the court would not clarify matters by requiring the state to elect.

*H. Cassidy Holden*, Assistant Attorney-General, for appellee.

The essentials of the crime of embezzlement are properly stated in the brief of counsel for appellant. They are: First. The thing converted must be within the statute. Second. It must have belonged to the party toward whom the accused occupied a fiduciary relation. Third. That it came into possession of the accused lawfully. Fourth. That accused occupied a fiduciary relation. Fifth. That the dealing of the accused with the property constituted a conversion of same. Sixth. That there was a fraudulent attempt to deprive the owner of it.

The first essential is unquestionably made out by the evidence for the state. The thing converted was one hundred dollars in cash and the proceeds of a bank draft for two thousand dollars. These objects are certainly within section 864, Hemingway's Code (Section 1136, Code of 1906).

The second essential is established fully by the evidence. It was shown that the money embezzled belonged to the Como Colored Methodist Church for whom the defendant was acting as agent and toward whom he occupied a fiduciary relation as such agent.

The third essential was fully established by the evidence. The money and the bank draft came into the hands of the accused lawfully.

The fourth essential was also established by the evidence. According to the testimony of the state's witness, the money was paid to the defendant for the specific purpose of purchasing materials with which he was to build a church edifice for the said church. The appellant claim-

ed that he occupied no such fiduciary relation; but that his relation was that of one party to a contract, and that this money was simply the first payment on the contract.

It is contended that a contractual relation only existed between the appellant and the officers of the church. The evidence does not bear out the contention of the appellant. On the other hand it shows that no contractual relations, except those between principal and agent, were intended by the parties. Had the parties intended to enter into a contract, they would have required a bond of the appellant before paying him any money on the contract. In such case bonds are always furnished by the contractor. But no bond was required in this case and it is readily apparent that the appellant was being employed by the officers of the church and he was not dealt with as an independent contractor. It is inconceivable that the appellant was paid two thousand one hundred dollars as an advance payment on a contract to construct a building, and was not required to execute a bond for the faithful performance of such contract. It is plain from the evidence that the officers of the church gave the appellant the money for the sole purpose of purchasing materials so that the construction of the building could be started immediately, this was the understanding between them as to the two thousand one hundred dollars. Upon the payment of this money the relation of principal and agent was formed and the appellant was guilty of embezzlement, within the meaning of the statute, when he took the money and absconded. If not guilty under section 864, then appellant was guilty under section 867, Hemingway's Code (Section 1139, Code of 1906). If the money which appellant received was not the money of his principal, then it was money delivered to him on a contract and as a trust fund, and he was guilty under the latter section. *People v. Ward* (Cal.), 111 Pac. 265; *State v. Russell* (Washington), 147 Pac. 194; *O'Morrow v. The State* (Tex.), 70 S. W. 209; *People v. Meadows* (N. Y.), 92 N. E. 129; *People v. Gregg* (Mich.), 135 N.

W. 970; *People v. O'Farrell* (Ill.), 93 N. E. 136; *State v. Brewington* (Del.), 78 Atl. 402.

Where the evidence is conflicting as to the existence of the relation of principal and agent, the question of agency is for the jury. *McCloskey Bros. v. Hood Milling Co.*, 119 Miss. 92, 80 S. O. 492. In the instant case this question was expressly left to the jury as shown by the first three instructions for the defendant and the instruction for the state. The jury found that the relation of principal and agent existed.

The appellant is guilty of a raw and highly reprehensible fraud. The verdict of the jury and the sentence of the court fully comports with justice. Embezzlement is a statutory crime. The statute is designed to cover cases of larceny which cannot be reached under the old statute and the common-law condemnation of larceny. Statutes providing punishment for certain forms of larceny called embezzlement, are designed for the very purpose of reaching persons like the defendant in this case. The defendant obtained the two thousand one hundred dollars lawfully and he cannot be convicted of larceny. Neither can he be convicted of obtaining money under false pretenses because he made no false pretenses which could be proved. If not guilty of embezzlement he is guilty of no crime under the law, and yet he has defrauded the members of this colored church to the extent of two thousand one hundred dollars.

It is respectfully submitted that he is guilty of embezzlement as defined by our statutes.

HOLDEN, J., delivered the opinion of the court.

B. T. Lawson appeals from a conviction for embezzlement, and urges reversal on the ground that the evidence introduced by the state does not sustain the charge of embezzlement.

In November, 1919, the Como Colored Methodist Church desired to erect a new church building, and had on hand available for that purpose two thousand eight hundred

and fifty dollars. The officers of the church organization entered into an agreement with the appellant, Lawson, to build the church for six thousand eight hundred dollars, which included all labor and material. Following this, the appellant obtained from the church officers two thousand one hundred dollars in cash, with which, as he represented, to purchase the lumber and material, and place it upon the ground within a few days to be used in the construction of the building.

When the money was turned over to appellant, he left Como for Memphis for the ostensible purpose of purchasing the materials for the church. Instead of doing so, however, he absconded, and left for parts unknown, appropriated the money to his own use, and was arrested and returned from California several months afterwards. He did not testify in his own behalf, but relied upon the failure of the state in its proof of embezzlement, and requested a peremptory instruction, discharging him after the state had concluded its testimony.

We have very carefully considered the evidence introduced by the state as shown by the record in this case, and we are compelled to conclude that the proof fails to sustain the charge of embezzlement.

In short, the proof shows that the church officers contracted with appellant to build the church complete, including all materials and labor, for the contract price of six thousand eight hundred dollars. There was no written contract, nor was there any indemnifying bond required of appellant by the church organization. It appears that the two thousand one hundred dollars turned over to appellant, through his representation that he intended to go to Memphis and purchase material for the building, was paid to him on the contract price of six thousand eight hundred dollars, and was to be credited on the contract, and the money was not turned over to him in trust for the specific purpose of purchasing the materials for the building. Therefore the fiduciary relation, or relation of trust, essential to embezzlement, never existed

between the parties. The money was paid to appellant as the contractor, for which he became liable civilly, but not criminally, when he appropriated it to his own use.

We say the appellant was not liable criminally, so far as the charge of embezzlement is concerned, under the proof in this case. As to whether he is guilty of another crime than embezzlement we do not decide. That the appellant, morally speaking, is a swindler of the most reprehensible sort this record leaves no doubt; but it is our plain duty to adhere to the rules of law with reference to the essential elements constituting the crime charged. The rule protects the honest, but unfortunate, contractor from criminal prosecution for appropriating funds paid him upon the contract.

If the money was paid to appellant on the contract, instead of intrusting it to him as agent for the specific purpose of buying the material, then, of course, he was the owner of the money, and could not embezzle his own property; and the proof in this record shows no appropriation of funds intrusted as agent, but shows an appropriation of funds paid to the appellant upon the contract price for the building of the church.

The judgment of the lower court is reversed, and the appellant discharged.

*Reversed, and appellant discharged.*

## FRONKLING v. BERRY.

[88 South. 331, No. 21470.]

1. **FRAUDS, STATUTES OF.** *Verbal lease, constituting completed contract, held not unenforceable under statute.*

A lessee, who has entered into possession of land under a verbal lease which was not to be performed within one year and has completed the contract, is liable for the rent; and when a lessor has exercised a contractual right to terminate a verbal lease at the end of a yearly period, this constitutes the lease a completed contract, and the mere failure to discharge mutual monetary obligations on a verbal contract otherwise completed does not render such contract unenforceable under the statute of frauds.

2. **WAR.** *Alien enemy may defend and hence may recover property distrained.*

A proceeding to recover property which has been seized under a distress for rent is essentially defensive in its nature, and an alien enemy, whose property has been seized under a distress for rent, may maintain the statutory proceedings to recover the property and assert such defensive rights as he may have under the lease.

APPEAL from circuit court of Coahoma county.

HON. W. A. ALCORN, JR., Judge.

Action by Willis Fronkling against Mary C. Berry.

Judgment for defendant, and plaintiff appeals. Reversed and remanded.

*John W. Crisler and Montgomery & Crisler, for appellant.*

The right of an alien enemy to defend a suit has never, so far as we have been able to find, been questioned by any court of last resort. We refer the court to the authorities collated under paragraph B, styled "Right to Defend," Ann. Cas. 1917C, page 211. We set out here an extract from one of the opinions cited there, this extract being also here quoted:

"To allow an action against an alien enemy to proceed and to refuse to allow him to appear and defend himself would be opposed to the fundamental principles of justice. No state of War could, in my view, demand or justify the condemnation by a civil court of a man unheard." *Robinson v. Continental Ins. Co.*, (1915) 1, K. B. (Eng.) 155, etc.

The supreme court of the United States speaking through Mr. Justice SWAYNE, in the case of *McVeigh v. U. S.* 20 U. S. (L. Ed.) 80, a case in which the trial court had ordered the answer of the respondent, an alien enemy, stricken from the files, and had granted a decree *pro confesso* made the following observation:

"In our judgement the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are *unanimous* in this conclusion, our opinion will be confined to that subject. The order, in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and the right administration of justice." (Citing authorities.)

"Whether the legal *status* of the plaintiff in error was or was not that of an alien enemy, is a point not necessary to be considered; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country (citing authorities) it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defense."

*M. E. Denton*, for appellee.

By his own testimony on page 35 of the record appellant shows that at the time this controversy arose, he was in jail. On page 89 and 99 it is shown that he had been committed to imprisonment by the president as a German alien enemy. Thereafter he filed a petition for *habeas corpus* in the federal court at Clarksdale but on November 11, 1918, after the armistice, this writ was dismissed by the federal court and appellant remanded to custody. Sometime after the armistice, he was admitted to bail and still later he was released without bail by the federal district attorney. But we are still at war with Germany and appellee is still under parol. These adjudications by the President and by the federal court were final and could not be questioned by appellant except by appeal. The rule is universal that alien enemies in time of war will not be granted any relief by the courts which constitute a part of the very Government which such enemy is seeking to destroy. This rule should apply with special force to spies, and I cannot agree that the fact of such enemy being in this county, rather than in the ranks of the enemy army affects this rule. The latest case I find on the subject is that of *Heiler v. Goodwin Motor, etc., Co.*, (1918), 3 American Law Reports Annotated, 336 and note.

W. H. COOK, J., delivered the opinion of the court.

The defendant, Mrs. Mary C. Berry sued out a distress for rent against the plaintiff, Willis Fronkling, seeking to recover rent alleged to be due and in arrears by virtue of a verbal lease of certain lands for a term commencing in 1916 and ending with the close of the year 1918, and in her affidavit she claimed a lien upon certain agricultural products for the sum of three hundred dollars, the amount of rent due for the year 1918. Subsequently the plaintiff, appellant here, in the manner provided by statute, instituted his replevin suit in the circuit court to recover

possession of the property, and upon the trial, in response to a peremptory instruction, there was a judgement for defendant, from which this appeal was prosecuted.

The testimony offered by appellant was substantially as follows: That in the early part of the year 1916 he entered into a verbal contract with appellee to rent certain farm lands for the years 1916, 1917, and 1918, for an annual rental of three hundred dollars; that he entered into the possession of the property under this verbal lease, but, being dissatisfied with the condition of the farm and the improvements thereon, he proposed to appellee a change in the terms of the contract; that a new contract or agreement was finally consummated, under the terms of which appellant agreed to make, at his own expense, all the improvements necessary to put the farm in good condition, provided appellee would rent him the property for the additional years of 1919 and 1920, but in the event appellee declined to extend the lease for these two additional years, then she was to pay appellant the reasonable value of all improvements put on the property by appellant; that under this agreement appellant remained in possession of the property for the years 1916, 1917, and 1918, and during this time made valuable permanent improvements on the land to the value of four hundred, thirty-five dollars and sixty-five cents; that in the latter part of the year 1918 appellant was notified that the property would not be leased to him for the two additional years, and thereupon he demanded to be compensated for the improvements which he had placed upon the premises; that this payment was refused, and thereupon appellant declined to pay the rent for the year 1918—hence the distress for rent due for that year.

The testimony offered by appellee was to the effect that the only contract between the parties was the verbal lease for the definite period of three years at a fixed rental of three hundred dollars per year, and that under the terms of this lease all necessary repairs or improvements were to be made by appellant at his own expense. Appellee

very positively denied, that this contract was ever modified or changed, and denied that she ever agreed to extend the lease to cover the two additional years.

At the conclusion of the testimony each of the parties, by a motion for a peremptory instruction, sought to invoke the statute of frauds against the claim of the other but we do not think this defense was available to either of them.

While it is true that the only express contract for the payment of rent was an oral agreement which was not to be performed within one year, yet, under every phase of the evidence, this was a completed contract, and the lessee was clearly liable for the rent. Upon the other hand, if the testimony offered on behalf of appellant was true, appellant had exercised her contractual right to terminate the lease at the end of the third year, and this constituted the second or modified contract a completed contract, and nothing remained to be done but to discharge mutual monetary obligations, and a mere failure to discharge a monetary obligation on a verbal contract otherwise completed is not sufficient to render the contract unenforceable under the statute of frauds. *Duff v. Snider*, 54 Miss. 245; *Washington v. Soria*, 73 Miss. 674, 19, So. 85, 55 Am. St. Rep. 555. In discussing this principle in *Duff v. Snider*, *supra*, Justice CHALMERS said:

"In the notes to the case of *Peter v. Compton*, in 1 Smith's Lead. Cas. 438, it is said to be universally conceded that no one can receive or enjoy the goods or services of another, and then rely upon the statute of frauds as an excuse for not paying for them, and that the weight of authority seems to be that the recovery in such cases must be according to the terms of the contract, and not merely for what the consideration would have been reasonably worth, if estimated at its market value, without reference to the price set upon it by the parties."

Again, in the latter case of *Washington v. Soria*, *supra*, the court said:

"It is uniformly held that, after full performance of an oral agreement, the statute of frauds does not apply. The statute neither declares an oral contract to be illegal nor void. It does not prohibit the contract, but simply declares that no action shall be maintained to enforce it. Where the contract has been fully executed by one of the parties, and nothing remains to be done by the other than to pay the consideration, relief is very generally afforded at law by permitting the plaintiff to recover, not upon the special contract, but in *assumpsit* or on the case, upon the promise implied by law, for the statute has no application to promises implied by law. 2 Reed on Statute of Frauds, section 640. Where there has been a special contract fully performed by the plaintiff, he may recover either in case, on the contract or in *indebitatus assumpsit* for the consideration. *Fowler v. Austin*, 1. How. (Miss.) 156; *Hill v. Robeson*, 2 Smed. & M. 541; *Cutter v Powell*, 2 *Smith's Lead. Cas.* 1; and note; 2 Devlin on Deeds, section 10474."

There was a sharp conflict in the testimony as to whether the first contract was ever modified or changed, and whether a second or modified contract was in fact ever made, and these disputed issues of fact should have been submitted to the jury under appropriate instructions.

After the conclusion of the testimony in the court below the appellee was granted leave to file a special plea setting up that appellant was an alien enemy of the United States government, and therefore could not sue in the courts of this state. On the record made in this case, this plea is not maintainable. While under our statutes a tenant who seeks to recover property seized under a distress for rent is denominated a plaintiff, yet the proceeding is distinctly defensive in its nature. Upon the institution of a distress for rent by a landlord or lessor, the only method provided by which the tenant or lessee may defend, or assert such defensive rights as he may have, is that followed in this case, and, whatever the form of the action, it cannot be doubted that the proceeding is essentially defensive. The authorities ap-

pear to be uniform in holding that an alien enemy may defend when he is sued in the courts of the hostile country. In *McVeigh v. United States*, 78 U. S. (11 Wall) 259, 20 L. Ed. 80, the Supreme Court of the United States said:

"In our judgment the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice. *Calder v. Bull*, 3 Dall. 388; *Bonaker v. Evans*, 16 Ad. & E. (N. S.) 170; *Capel v. Child*, 2 Crompton & J. 574. Whether the legal *status* of the plaintiff in error was, or was not, that of an alien enemy, is a point not necessary to be considered, because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country (*Clark v. Morey*, 10 Johns. 69; *Russell v. Skipwith*, 6 Binn. 241), it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defense."

See also Ann. Cas. 1917C, 211, and authorities there collected.

It follows from the views herein expressed, that this case must be reversed and remanded.

*Reversed and remanded.*

MOODY & WILLIAMS, v DYE *et al.*

[88 South. 332, No. 21771.]

1. GARNISHMENT. *Judgment against garnishee extinguished on reversal of main judgment.*

A judgment against a garnishee is incidental to, and dependent upon, the main judgment, and cannot stand where the judgment in the main action has been annulled by reversal.

2. JUDGMENT. *Suit to restrain execution of judgment against garnishee direct attack.*

Where a judgment against a garnishee is extinguished by the annulment of the main judgment, the garnishee may enjoin execution of the judgment against him; such attack being direct and not collateral.

3. JUDGMENT. *Offer of equity unnecessary before garnishee may have relief against extinguished judgment.*

Where a judgment against a garnishee has become invalid because the judgment in the main action has been annulled by reversal, it is not incumbent upon the garnishee to offer to do equity to the assignee of the judgment before he is entitled to relief against the extinguished garnishment judgment.

APPEAL from chancery court of Sharkey county.

HON. E. N. THOMAS, Chancellor.

Suit by T. W. Dye, and others against Moody & Williams. From a decree sustaining the bill, defendants appeal. Affirmed.

*Moody & Williams, and Chapman & Johnson, for appellants.*

To vacate the judgment against him as garnishee Dye attacks the judgment against Cook, in favor of Pitts, upon which the writ of garnishment was issued, as being void. This constitutes a collateral attack on that judgment, and we submit, in respect to its validity, or binding effect it is not open to impeachment in any collateral action or proceeding.

The purpose of this proceeding is to vacate the judgment, rendered in favor of Pitts against Dye, as garnishee, and not to vacate the judgment, rendered in favor of Pitts against Cook, as the defendant, though to get the relief sought it is necessary to vacate the judgment in favor of Pitts against Cook, so we insist that the principle stated applies to the facts of this case, and that the attack by Dye on the judgment against Cook is a collateral attack. That Dye has no right, in this proceeding, to question the validity of that judgment.

The principle thus stated has been applied in the following cases: *Bostic v. Love*, 16 Cal. 69; *Trogon v. Cleveland Stone Co.*, 53, Ill App. 206; *Sturgis v. Rogers*, 26 Ind. 1; *Elmore v. Richards*, 25 Ill. 289; *Catchum v. Edwards*, 39 N. Y. Suppl. 1012; *Wilkinson v. Holton*, 46 S. E. 620; *Mann v. Jennings*, 6 So. 771; *Drydon v. Parotte*, 85 N. W. 287; *Vicksburg Groc. Co. v. Brennan*, 20 So. 845 *Martin v. Miller*, 103 Miss. 754; 16 Am. & Eng. Enc. of Law (2 Ed.) page 374; *Ferguson v. McKinney*, 60 Miss. 763-771; *Field, Morris & Fenner v. McKinney*, 60 Miss. 763; Attach (5 Ed.) sec. 692, et seq.

It is contended that the subsequent reversal of the judgment against Cook *ipso facto* vacated the judgment against Dye as garnishee. As to that we say: First: That it did not and while Cook might, in a proper proceeding have had the judgment against Dye, as garnishee, vacated, yet even Cook, could not in this proceeding, do so. If not, certainly Dye, as garnishee at his instance only could not. Second: That, even if it did, a court of equity can vacate said judgment only on condition that equity is done.

As To The First Proposition. While we are not concerned as to the right or remedy afforded Cook because of a subsequent reversal of the judgment against him, yet to clear the matter, it may be well to briefly state what those rights are, and the remedy afforded Cook for asserting them.

If, before the reversal, the judgment against Cook had been paid by him, he would, by the reversal of the judgment, have the right to get his money back. He could sue Pitts for money had and received. *Bank of U. S. v. Bank of Washington*, 8 Law Ed. (U. S.) 299.

Even if Dye had paid the judgment against him as garnishee, to Pitts, Cook would still have the right because of the reversal of the judgment against him to recover from Pitts the amount paid. *Hall v. Wells*, 54, Miss. 289-306. The defendant, Cook did not appeal, with *supersedeas* until long after the judgment against Dye, as garnishee, was rendered. Without an appeal, with *supersedeas*, Pitt had a perfect right to enforce his judgment. Sec. 50, Code of 1906; *Memphis Grocery Co. v. Anderson*, 76 Miss. 322. The subsequent appeal, had *supersedeas*, did not have a retroactive effect. This is clear. *Runyon v. Bennett*, 29 Am. Dec. 431. Thus it is clear that the judgment against Cook was only voidable, and had no appeal been prosecuted by Cook the judgment against Dye, as garnishee, was regular in every respect. Reversal of judgment. Does the subsequent reversal of the judgment against Cook *ipso facto* vacate the judgment against Dye, as garnishee, as between Pitts and Dye, not as between Pitts and Cook, but as between Pitts and Dye? That, is the only question presented by this appeal. The attorney for the appellant, who presented this case to the lower court, relied on, and used as authority the following: 95 Am. St. Rep. 132, et seq., note; 4 Corpus Juris, 1205, sec. 325, Note 11, 26, Mich. 381; 97 Am. St. Rep. 328; 6 Am. & Eng. Anno. cases 751, and 2 Ruling Case Law, page 271. Your attention is especially directed to the case of *A. G. Ry. Co. v. Crawley*, 118 Miss. 272.

Garnishment is a statutory proceeding whereby a debt due the defendant by another may be subject to the satisfaction of the judgment against the former. On principle, it is like unto an execution, differing only as to its result, in that intangible, rather than tangible property, is subjected to satisfaction of the judgment. In both instances,

however, it is the property of the defendant that is subjected. In this respect a judgment against a garnishee is similar, on principle to a judgment against claimant. By such a judgment, neither the claimant, nor the garnishee, is deprived of anything. When the judgment is rendered against the defendant, upon which the execution, in one instance, or the writ of garnishment, in the other, issued, if anyone has the right to complain of the judgment (against the defendant) or the enforcement thereof, it is certainly not the claimant, or garnishee. Of course, in both instances there must be a valid judgment against the defendant, at the time the judgment against the claimant, or garnishee is rendered; but whether the defendant is discharged from such a judgment or not, the defendant, and the defendant only, has the right to complain.

When an execution issues, and is levied on certain tangible property one who claims it, other than the defendant, files a claimant's affidavit, and the issue to be tried is, whether the property belongs to the defendant or the claimant. The plaintiff, in execution, tenders an issue to the effect that the property levied on, belongs to the defendant and is subject to execution. On this issue the case is tried. To make out his case the plaintiff, must, of course, introduce the judgment, the execution, the officers return and prove that the property, levied on brings to the defendant, and is subject to the execution. That is the very foundation of the execution and levy, the judgment is introduced. *Blacklock v. Stephens*, 81 Miss. 711, 33 So. 508.

If a judgment is rendered for the plaintiff in execution it is for the property or the value thereof. If the defendant appeals from the judgment, upon which the execution issued, it being presumed he had not prior thereto appealed, with *supersedeas*, otherwise the execution could not issue, and if on the appeal, such judgment is reversed, it does not, *ipso facto* reverse the judgment against the claimant, even at the instance of the defendant. Even the defendant must ask for restitution when the judgment against him is reversed.

What we have thus stated is in line with the decisions of this court, as we shall clearly show by the following cases: *Wills v. Loeb*, 59 Miss. 169; *Alexander v. Dulaney*, 16 So. 355. We do not contend that Cook was without remedy to have vacated the judgment rendered against Dye, as garnishee, which subjected the debt due by Dye to the judgment against Cook when the latter was reversed, Cook had ample remedy but it is not Cook that complains.

When the judgment against Cook, in favor of Pitts, was reversed by this court, this court had the power to order a restitution by setting aside the judgment against Dye, as garnishee, if the record, before this court, showed that such a judgment had been entered. If, however, the record fails to show that judgment, then Cook had the right, when the cause was remanded, to have the circuit court award restitution by ordering that judgment be set aside. That is the express holding of the court in *Hall v. Wells*, 54 Miss. 289-306.

As To The Second Proposition? The Complainant, Appellee Did Not Offer To Do Equity. This court is fully committed to the proposition that a judgment, though void, will not be enjoined unless the party who seeks the injunction does equity. *Stewart v. Brooks*, 62 Miss. 892; *Newman v. Taylor*, 69 Miss. 670; *Walker v. Mitchell*, 97 Miss. 231; *Welsh v. Hannie*, 72 So. 861.

Had the bill in this cause been filed by Cook to vacate the judgment against Dye, as garnishee, because of the subsequent reversal of the judgment, upon which the judgment against the garnishee was predicated, there is no doubt but that Cook would be required to pay the debt owing by him to Pitts. This, as we understand it, is settled in *Catlett v. Drummond*, 113 Miss. 50, 74 So. 323.

Conclusion. To make clear our position on the facts of this case, we contend: 1. That the trial court properly found as a fact that the writ of garnishment was personally executed on the appellee. 2. That the judgment in favor of Pitts against Cook was not void for want of jurisdiction, but at most, only voidable because of the fact that the

trial court in that case erred in overruling the motion for a change of venue. 3. Even if void, as claimed, it is not subject to collateral attack by the appellee. In this proceeding, as held by this court in *Field v. McKinney*, 60 Miss. 763, the garnishee has no interest in the jurisdiction of the court nor in the regularity of the proceedings, insofar as they relate to the judgment against the defendant, and cannot of course, thereafter attack the validity of such judgment. Section 2350, Code 1906. 4. While Cook, because of the subsequent reversal of the judgment against him, had ample remedy at law by restitution to have had the judgment against Dye, as garnishee, set aside, yet even he, having failed to avail himself of the remedy the law afforded, cannot, in equity, have said judgment vacated. If Cook could not because of his failure to avail himself of the remedy the law afforded, have relief in equity certainly Dye could not. 5. Dye, as garnishee, neither at law, nor in equity has the right to have the judgment against him, as garnishee, vacated because of the subsequent reversal of the judgment against Cook. 6. Even if it be conceded for the sake of argument, and that only, that Dye has the right to have the judgment against him as garnishee vacated, and equity affords the remedy, yet a court of equity cannot act except upon condition that Dye pays the amount admitted to be due, not by Dye to Cook, but by Cook to Pitts, for which the original judgment against Cook was rendered.

*Bell & White*, for appellee.

We take the position here, as we did in the court below, that the reversal by this court in April, 1917, of the Pitts judgment against Cook, (74 So. 777) necessarily carried with it the garnishment judgment against the Dyes, based on the Pitts judgment. This court, in reversing the cause, used the following language:

"In *Campbell v. Triplett*, 74 Miss. 365, 20 So. 844, Judge COOPER held that where an attachment was sued out in

Winston County, but which was not served on any property in that county, and where the defendants were served in another county, and none of the defendants were found in the county where the suit was filed, the court did not acquire jurisdiction." He says:

"The venue of civil actions of this class is in the county in which the defendants or any of them may be found, and if no defendant is served with process in the county in which the suit is brought, the jurisdiction of the court does not attach. *Wolley v. Bowie*, 41 Miss. 553; *Pate v. Taylor*, 66 Miss. 67, 5 So. 515. See, also, *Spain v. Winter*, Walk. 153; *McLeod v. Shelton & Minor*, 42 Miss. 517. Judgment of the court below will be reversed, the motion for change of venue sustained and the cause remanded to the circuit court of Sharkey County for further proceedings. Reversed and remanded."

From the above, it is clearly evident that it was the opinion of this court and the only opinion which could be rendered, that the Sunflower County court did not have jurisdiction and therefore, the judgment rendered was absolutely void.

This being the case, we submit to the court the following authorities on the question of law: "We may state here that we have been unable to find any authorities contrary to those cited. It is about the only case in the recollection of the writer in which the authorities seem to have been all one way."

In 4 Corpus Juris, page 1205, section 3250, we find the rule stated as follows: "On the reversal of a judgment, order, or decree, a dependent order, judgment or proceeding ancillary and accessory thereto, shares its fate and falls with it."

In Note 11, same page of same authority, section F, we find the following: "(1) Should the judgment upon which a process of garnishment has been issued in aid of execution be set aside, the garnishment proceedings necessarily fall with it. *Clough v. Buck*, 6 Nebr. 343. (2) Likewise a judgment against a garnishee, cannot stand where the

judgment in the main action has been reversed." *Decatur v. Simpson*, 119 Iowa, 488, 93 N. W. 496, 97 Am. St. Rep. 328; *Chicago Herald Co. v. Bryan*, 195 Mo. 590, 92 S. W. 906, 6 Ann. Cas. 751, and note; *Smith v. Kansas City, etc., R. Co.*, 49 Mo. App. 54.

We find the same rule stated in 2 Ruling Case Law, page 271, latter part of section 223. *Decatur v. Simpson*, 93 N. W. 496; *Whittington v. Southworth*, 26 Mich. 381; *Rowlett v. Lane*, 43 Tex. 274.

The court will find reference to similar opinions following the same line of reasoning collated in the Third Century Digest, title, "Appeal and Error," section 4629, and in volume 2 of the Decennial Digest, same title, section 1180. (2) and in Vol. 2, of the Second Decennial Digest, section 1180 (2). We have cited above the cases found by us exactly in point and here direct the attention of the court to the fact that no opposing cases are cited by the counsel for appellant.

HOLDEN, J., delivered the opinion of the court.

This appeal presents a suit which was started by a bill filed by appellee Dye seeking to vacate a judgment against him as garnishee, and to perpetually enjoin execution under it. From a decree sustaining the bill appellants, Moody & Williams, assignees of the judgment against Dye appeal.

Briefly stated, in 1915 W. T. Pitts sued and recovered judgment against E. B. Cook for two thousand, eight hundred and ten dollars as damages for breach of a contract. Garnishment upon this judgment in favor of Pitts was issued against appellee Dye, and a judgment for the amount of two thousand, eight hundred and ten dollars was rendered against him as garnishee. Several executions were issued on this garnishment judgment, but returned *nulla bona*. Pitts then assigned the judgment to the appellants, Moody & Williams, who were the attorneys for Pitts in the litigation. Finally execution un-

der the judgment was levied upon the land of appellee Dye, whereupon he filed the bill in this cause to vacate the judgment and enjoin the execution.

In the meantime, Cook, the judgment debtor in the main judgment, appealed to the Supreme Court, which reversed the main judgment obtained by Pitts against him. See *Cook v. Pitts*, 114 Miss. 39, 74 So. 777.

The original bill of appellee Dye based its claim for relief upon the ground that, the judgment of Pitts against Cook having been reversed by the Supreme Court, the garnishment proceedings and judgment based upon it fell with the judgment, and that no execution could be issued on it. To put it in another way, the contention is that the garnishment proceedings and judgment against the garnishee was incidental to and dependent upon the main judgment of Pitts against Cook, and that when the main judgment was reversed and annulled then the judgment against the garnishee *ipso facto* became null and void, for the reason that when the main judgment is extinguished by annulment the judgment against the garnishee can no longer rest upon it and must fall.

The contentions made by the appellant in opposition to the position of the appellee are that appellee Dye is attacking the judgment of Pitts against Cook by a collateral proceeding, which cannot be done; that the appellee Dye failed to protect himself against a void judgment under section 2350, Code of 1906 (Section 1945, Hemingway's Code); that the right to vacate the garnishment judgment when the main judgment is reversed can be exercised only as between the parties to the original judgment; that the judgment against the garnishee did not fall with the reversal of the main judgment, as it was not appealed from and could be resisted only by the original judgment debtor; and, finally, it is contended that appellee was not entitled to relief because he did not offer to do equity in the case.

We are of the opinion the true rule is that a judgment against a garnishee cannot stand where the judgment in the main action has been reversed. The garnishment pro-

ceedings grow out of and are incidental to the main judgment, and a judgment against a garnishee rests upon the main judgment which gives it life, and when the main judgment is annulled the garnishment judgment must fall with it. The garnishment judgment is only for the purpose of enforcing the payment of the main judgment, and if there be no main judgment to enforce because of its annulment, then the purpose and life of the judgment against the garnishee is ended. Therefore the judgment against the appellee Dye, as garnishee in the original suit, was extinguished when the main judgment was annulled by reversal of the Supreme Court. 4 C. J. 1205 and notes; 2 R. C. L. 271.

Counsel for appellants do not seem to dispute the principle announced above, but make the contention that the rule can be applied only as between the original parties to the main judgment, and that Cook only could complain at the judgment against Dye. It is our conclusion that the appellee, as a party to the judgment, was well within his rights to protect himself against execution under the void garnishment judgment after the annulment of the main judgment and when execution was levied against his property it also appearing in this record that Dye was liable to and did pay Cook the amount of his indebtedness to him. 12 R. C. L., sections 100, 109; *Chicago v. Bryan*, 195 Mo. 590, 92 S. W. 906. In *Railroad Co. v. Crawley*, 118 Miss. 272, 79 So. 94, the main judgment was not annulled.

As to the contention of appellant with reference to the collateral attack of the judgment, we think there is no merit in the point, because the attack is directly to vacate the judgment and enjoin process thereunder, because of its invalidity by extinguishment.

As we have already said in this opinion, the judgment against the garnishee must fall when the main judgment is annulled. Counsel cites the case of *Alexander v. Dulaney*, 16 So. 355, which in turn cites the case of *Willis v. Loeb*, 59 Miss. 169, and contends that the Dulaney Case announces the opposite rule in this state. We disagree

with counsel, in this claim, as a careful study of the Dulaney and Willis Cases will demonstrate, regardless of some language inadvertently used by the court, it was not intended to be announced that where the main judgment is reversed any other judgment incidental to or depending upon the main judgment would not fall. However, in that case the litigation was between the attaching creditor and debtor and the claimant of the property. But we recognize the principle involved as analogous, if not exactly similar, to the one under discussion.

The last point presented by appellant, that it was incumbent upon the appellee to do equity before asking equitable relief, is without merit, because, as we see it, he was under no duty or obligation flowing from good conscience to offer anything to the appellants in satisfaction of their void claim, as evidenced by the extinguished judgment.

The judgment of the lower court is affirmed.

*Affirmed.*

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BUCKLEY *et al.* v. CITY OF JACKSON

[88 South. 334, No 21872.]

- 1 MUNICIPAL CORPORATIONS. *Property owner held liable for interest on legal item of assessment from time assessment made final.*

Where a front-foot assessment is made against a city property owner under chapter 260, Laws of 1912, as amended by chapter 236, Laws of 1914 (Hemingway's Code, sections 5941 to 5965, inclusive), and such assessment is composed of charges for different items of improvement, and the property owner contests the assessment in the courts and succeeds in having all the items of assessment declared illegal except one, he is still liable for interest on that item under section 23 of said chapter 260, Laws of 1912, as amended by chapter 236, Laws of 1914 (Hemingway's Code, section 5957), from the time the assessment was made final.

125 Miss.]

Brief for Appellant.

2. MUNICIPAL CORPORATIONS. *By tendering amount due on legal item of assessment, property owner may escape liability for interest.*  
In such case the only manner in which the property owner could save himself from interest on the item finally held to be legal would have been to concede its legality and make a tender of the amount.

APPEAL from chancery court of Hinds county.

HON. V. J. STRICKER, Chancellor.

Suit by Agnes Buckley and others against the City of Jackson. Decree in favor of defendant, and plaintiff named appeals. Affirmed.

See, also, 85 So. 122.

*Green & Green*, for appellant.

The question presented in this appeal is as to whether or not there is a liability for interest when two items composing essential portions of the assessment have been by this court held illegal and not susceptible of assessment as such. The precise question was decided in *Langstaff v. Town of Durant*, 84 So. 460.

By section 100 of the Constitution, it is expressly provided: "Section 100. No obligation or liability of any person, association, or corporation held or owned by this state, or levee board, or any county, city or town thereof, shall ever be remitted, released or postponed, or in any way diminished by the legislature, nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; but this shall not be construed to prevent the legislature from providing by general law for the compromise of doubtful claims."

In *Morris v. Adams*, 75 Miss. 410, it was expressly held that the municipality was without power to release taxes due. Now this imposition upon the property of appellant was in virtue of a special statutory power, as said in *Jackson v. Williams*, 92 Miss. 317; *Railroad Company v. Jackson*, 96 Miss. 576. Knowing, therefore, the strictness which is required, we examined the provisions for interest

to be found in the statute, viz; section 3412, provides: " . . . Then the Street Commissioner shall . . . make the repairs, construct the improvement . . . keeping an account thereof and report the same to the board at its next regular meeting thereafter for adjustment."

In pursuance of this authority, the street commissioner did so report, and his report showed the cost of doing this work as two hundred, seventy-nine dollars and forty-three cents, embracing three several items, paving, grading and water and sewer connection, all of which the municipality of Jackson claimed to be good and valid elements which would have to be integrated into the assessment.

Now by section 3412 it is further provided: "And each lot shall be liable and bound by a lien paramount to all other liens, being its proportion of the cost of such improvement."

Now this improvement may consist of the paving, water connection and the sewerage, each and every item of which was so reported, and each and every item of which was thereupon, by an order on the minutes of the board, integrated into the total cost of the improvement and then apportioned among such abutting lots . . . by the board by order on its minutes by taking the whole number of front feet improved and dividing such total cost thereby and multiplying the quotient by the number of feet contained in such abutting lot and the result shall be as assessed by the board as the amount of the special tax to be assessed.

Now in the instant case, the cost of the sewerage system, the cost of the water connection and the cost of the grading and paving were each taken. Thereafter the total number of feet improved was divided thereunto and then out of eighty foot front multiplied by its quotient and as a result we received an assessment of two hundred, seventy-nine dollars and forty-three cents.

The duty of the aldermen is thus expressed: "And the result shall be assessed by the board as the amount of the

special tax to be assessed against each lot . . . and if not paid within thirty days after such assessment, the amount assessed shall thereafter bear six per centum per annum interest."

The contention of the appellant is that it was beyond the power of the municipality to integrate into this assessment for two hundred, seventy-nine dollars and forty-three cents the water connection and the sewer connection, but notwithstanding this lack of power, such items were integrated and if appellant had tendered the amount of the paving assessment alone at any time up to the hearing of this cause, it would not have been received by the city because up until 1918, the city integrated therein the cost of water connection, and up until the hearing in this cause demanded the cost of the sewer connection and up to this minute there has not been an assessment against this property embracing only the legal liability thereunto apportionable, viz; paving and grading from 1912 to the hearing in the court below. The municipality of Jackson consistently and persistently sought to exact a sum in excess of that which is now admitted to be due, but seeks, notwithstanding such admission, to compel this appellant to pay interest upon, not the total assessment, but only that portion of the assessment which has been found legal, disregarding the portion which has been found to be illegal.

By section 2678 of the Code, it is expressly provided; "2678. (2348) Legal rate. The legal rate of interest on all notes, accounts and contracts shall be six per centum per annum; but contracts may be made, in writing, for the payment of a rate of interest as great as ten per centum per annum. And if a greater rate of interest than ten per centum shall be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory."

Now claims against a county do not bear interest. *Warren County v. Klein*. 51 Miss. 807.

In *I. C. R. R. Co. v. Adams*, 78 Miss. 895, at page 902 the court said: "Can interest upon delinquent taxes be recovered upon an injunction bond by designating it as damages. If it can be thus recovered, it surely would be recoverable in a direct suit therefor. The basis for recovery must be the same in both instances. Calling interest damages, could not operate to make that liable which was not liable under the name of interest. Interest is entirely statutory. It was not allowable by the common law, and existed only by positive legislation. *Easton v. Foster*, Walker Rep. 214; *Homer v. Kirkland*, 25 Miss. 96.

There is no power in the chancery court to assess taxes. As said by Justice POTTER in *Johnson v. Manufacturing Co.*, 71 Co. 378; *State Revenue Agent v. Tonella*, 70 Miss. 701, 14 So. 17, 22 L. R. A. 346; Welty on Taxation, Par. 10; *People v. Kelsy*, 34 Calif. 473; *People v. Hastings*, 29 Cal. 450; *People v. Sargent*, 44 Cal. 434; *Houghton v. Austin*, 47 Cal. 646; *Richmond v. Danville R. R. Co. v. Commissioners*, 74 N. C. 506; *Railroad Co. v. Commissioners*, 72 N. C. 10.

Thus, the chancery court was wholly without power to make this assessment and a condition precedent to its validity is the performance of those acts held requisite in *Langstaff v. Durant*. We are frank to say that we will at once pay the amount due for paving and grading, and would have done so at any time it might have been acceptable.

W. E. Morse, for appellee.

The appellant has properly stated the question for this court to pass upon. Can the city of Jackson collect interest for the paving and grading cost which was assessed against the property of the appellant?

The city of Jackson does not attempt to collect interest for the water connection for the reason that the supreme court in the *city of Jackson v. Hart*, 78 So. held that as the lead pipe connection was not set forth in the plans and

specifications that therefore the city could not establish a lien for this item.

The chancellor below held that the city could not collect for sewer connection upon the same line of reasoning. The appellant admits that the item for paving and grading of two hundred, fifty-five dollars and sixty cents is correct after the supreme court had twice said that it was in the Sparks case, and in this same case when it was before this court.

Appellant while admitting that the item is just and legal and should be paid, says that she should not be charged with interest on this item. She states if any interest is computed it should be upon the paving and grading, water connection and sewer connection and she then turns around and says that you can't do this for the reason that it contains illegal items, and that interest cannot be computed on illegal items. That is the correct rule of law where the items are not capable of division, but where they are divisible there is a different rule to be employed.

Appellant cites *Langstaff v Durant*, as upholding the contention that interest could not be collected. That is a true statement but not the whole truth, for the reason that in the Langstaff case the town of Durant borrowed money and attempted to include the item of interest on the money borrowed, attorney's fees and engineer's fees in this assessment. The items were not itemized at the time of the assessment so that they might be eliminated.

In the instant case there was so much for the paving and grading, so much for the water connection and so much for the sewer connection, showing specifically what each and every item cost. So that we could eliminate those items which the court said were not collected.

Appellant proceeds upon the theory that there has been a tender of the amount due, that this was done at the very beginning, she does not say so in so many words but the inference is strong. There has been no tender, there is nothing in the record relative thereto.

It is true that the city might not have accepted the amount for paving and grading had it been tendered to it before the decision of the court in the Hart case. And had this been done it would have a different effect on the standing of the parties, but this was not done.

Appellant has contested the enforcement of the city's claim for four years and has raised every objection and defense available to her in this matter. She now states that she is willing to pay the principal but not the interest. They who dance must pay the piper. Those who litigate must suffer the consequences.

Appellant could just as well contend that as the item of water connection and sewer connection were assessed along with the paving and grading, that this constituted an assessment as a whole and as such if some items were uncollectable, then the others could not be unless the property was reassessed.

Appellant realizes that this proposition is not sound; yet this is in effect what appellant would have the court do, as the interest is statutory and begins thirty days from the date of assessment. To follow the course suggested by the appellant would be to set aside the decision of this court in the case of *Sparks v. City*, 79 So. 67; *City v. Buckley*, 85 So. 122.

We think the chancellor was right: (1) The assessment was legally made and not appealed from. (2) The items were itemized so that a person was put on notice of everything. (3) Interest is statutory and should be computed on the legal amount due.

ANDERSON, J., delivered the opinion of the court.

This appeal by Mrs. Agnes Buckley is from a final decree against her in favor of the appellee. The case was tried in the court below on an agreed record.

At the May, 1912, meeting of the mayor and board of aldermen of the city of Jackson the property of the appellant, consisting of a lot in said city fronting eighty feet

on the west side of North State street, was assessed with its share of the cost of the special improvement made on said street as follows:

"Pavement and grading, two hundred, fifty-five dollars and sixty cents; water connections, forty and one-half feet at forty-five cents, eighteen dollars and twenty-three cents; sewer connections, sixteen feet at thirty-five cents, five dollars and sixty cents; total, two hundred, seventy-nine dollars and forty-three cents."

The special improvement in question was made under chapter 260, Laws of 1912, as amended by chapter 256, Laws of 1914 (Hemingway's Code, sections 5941 to 5965, inclusive).

The court below, under the authority of the case of *City of Jackson v. Hart*, 117 Miss. 871, 78 So. 780, held that the assessments for the water and sewer connections, the assessment for the former being eighteen dollars and twenty-three cents, and the latter five dollars and sixty cents, were illegal; but rendered a decree against the appellant for two hundred fifty-five dollars and sixty cents, the amount assessed for paving and grading with interest thereon as provided in section 23, chapter 260, Laws of 1912, as amended by chapter 256, Laws of 1914 (Hemingway's Code, section 5963.)

The only error assigned is directed to that part of the decree allowing interest on the assessment for paving and grading.

It is shown by the agreed facts that from the time this assessment was confirmed by the municipal authorities until the decision of the case of *City of Jackson v. Hart*, *supra*, on June 10, 1918, the appellee insisted on the payment of the entire amount of the assessment, including the assessment for the water connection and the sewer connection, and up to the rendition of the final decree in the court below on October 7, 1920, insisted on the payment of the assessment for the sewer connection as well as that for the grading and paving assessment. It is contended on behalf of the appellant that she should not be made to pay inter-

est on that part of the assessment which was held to be legal, being for the grading and paving, because the city of Jackson was insisting at the same time on the payment of the other assessments which were held to be illegal. Each item of improvement with its cost was distinctly set out. There was no integration of the items, on the contrary they were plainly segregated.

Section 23, chapter 260, Laws of 1912, as amended by chapter 256, Laws of 1914 (Hemingway's Code, section 5963), under which this improvement was done, expressly provides, among other things:

"It shall be the duty of the property owner to pay the assessment within thirty days after the assessment is finally made. If the assessment be not paid in thirty days it shall bear interest at the rate of six per cent., and the mayor and board of aldermen may order suit to be brought in the chancery court to enforce the lien."

*Langstaff v. Town of Durant*, 122 Miss. 471, 84 So. 459, is cited as supporting the contention of appellant. We do not so understand that case. The court did hold in that case that the property owner could not be charged with interest paid by the town on borrowed money procured to make the special improvement pending the raising of the funds for that purpose in the manner laid down by statute; but, in that connection, the court held that the property owner was liable for interest accruing after the assessment was due.

The statute controls. It expressly provides for interest if the assessment is not paid within thirty days from the time it was finally made. If the property owner chooses to fight the assessment in the courts, he takes the chance of failure with all its consequences, as do litigants in other character of causes. If he wins out entirely he saves the whole assessment, including the interest of course, and if he wins in part only so far does he save the assessment and interest.

In the opinion of the court under the facts of this case the only way appellant could have saved interest on the

grading and paving item held to be legal, and at the same time contest the legality of the other items, would have been to tender the appellee, when due, the amount of that assessment. This was not done. 37 Cyc. 1159, 1160.

*Affirmed.*

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*MUTUAL LIFE INS. CO. OF NEW YORK v. BATSON.*

[88 South. 335, No. 21668.]

*INSURANCE. Company held under no obligation to apply reserve on lapsed policy to extension thereof, in absence of demand.*

Under section 88, chapter 690, of the 1892 Session Laws of New York, an insurance company is under no obligation to apply the reserve on a lapsed life insurance policy to the extension of the policy, unless a demand therefor is made on the company within six months after the lapsing of the policy.

APPEAL from chancery court of Forrest county.

HON. D. M. WATKINS, Chancellor.

Suit by Mrs. Sarah S. Batson against the Mutual Life Insurance Company of New York. Decree for plaintiff, and defendant appeals. Reversed and bill dismissed.

*Fulton Thompson and R. H. & J. H. Thompson, for appellant.*

*Tally & Mayson, for appellee.*

No brief found in the record for either side.

SMITH, C. J., delivered the opinion of the court.

On March 25, 1902, the appellant executed and delivered to R. T. Batson its two insurance policies for one thousand dollars each on the life of Batson, payable to

his wife, on which the annual premiums were payable in advance on the 25th day of March of each year. In October, 1914, Batson borrowed from the company three hundred and sixty-seven dollars on each of the policies, executing and delivering to the company his two promissory notes each for that amount, and also delivering to the company the two policies as security for the notes. These notes were due on March 25, 1915, the date on which the next premiums on the policies became due after the execution of the notes, and the cash-surrender value on each of the policies on that date was three hundred and sixty-seven dollars, the amount on each note. Batson failed to pay these notes when they became due or thereafter, as well as the premiums due on the policies on March 25, 1915, and, after some negotiations between him and the company relative to the renewal of the policies, they were canceled by the company. Batson died on November 29, 1915. After his death his widow, the beneficiary in the policies and the appellee herein, exhibited an original bill against the appellant, alleging, among other things, that on March 25, 1915, the cash-surrender value of each of the policies was four hundred and three dollars, an amount sufficient to pay each of the notes and to carry each of the policies beyond the date of the death of the insured; and, second, that the reserve on each of the policies on that date was also more than sufficient to carry them beyond the date of the death of the insured. The bill prayed for an accounting and for a decree against the company for the face of the policies, less what might be found to be due the company thereon, and there was a decree accordingly.

1. The policies each contain a table setting forth the cash-surrender and loan values thereof "for end of each year." The cash-surrender value for end of the twelfth year is three hundred and thirty-two dollars, for end of thirteenth year, three hundred and sixty-seven dollars, and for end of fourteenth year, four hundred and three dollars. The loan value for end of twelfth year is three

hundred and sixty-seven dollars for end of thirteenth year is four hundred and three dollars, and for end of fourteenth year is four hundred and forty-one dollars. The loan value for the end of each year, it will be observed, becomes the cash-surrender value for the end of the next year.

The notes were for three hundred and sixty-seven dollars each, the loan value of each of the policies for the end of the twelfth year, and matured on March 25, 1915, the end of the thirteenth year, and, as the cash-surrender value of each policy was then three hundred and sixty-seven dollars, it was sufficient only to liquidate the notes. The appellant seems to have either confused loan value with cash-surrender value, or to have overlooked the fact that these values apply at the end and not at the beginning of the year.

2. The policies are governed, according to the contention of each of the parties hereto, and we will therefore assume, by the statutes of the state of New York, and one of the appellee's contentions is that the evidence discloses that the reserve on each of these policies computed as provided in section 88, chapter 690, of the 1892 Session Laws of New York was sufficient to have continued each of the policies in force beyond the date of the insured's death. The appellant contends that this statute has no application here on account of a provision in the policies authorized by another statute, but, assuming for the sake of the argument that the statute does apply, it can afford the appellee no relief for two reasons: First, no demand was made by either the insured or the appellee on the company within six months after the policies lapsed for the application of the reserve thereon to the purchase of extended insurance, which demand is by the statute "required to be made to prevent the forfeiture of the policy;" second, the evidence does not disclose what the reserve on these policies amounted to on March 25, 1915; the only evidence relative thereto being the amount of the dividends apportioned by the company at the end of twenty-

year distribution periods, provided therein to policies for one thousand dollars issued in 1896, 1897, 1898, and 1899, some of which were certainly and others probably different from the policies here in question.

*Reversed, and bill dismissed.*

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MARYLAND CASUALTY CO. v. HALL

[88 South. 407, No. 21833.]

1. **PRINCIPAL AND SURETY.** *Employer bound to report only facts justifying charge of larceny or embezzlement under indemnity bond.*

Where a surety company has executed a bond indemnifying an employer against loss by reason of any act of an employee constituting larceny or embezzlement, under a provision of the bond requiring the employer to give written notice to the company immediately upon becoming aware of any loss which might be made the basis of a claim thereunder, the employer is not bound to report his suspicions arising from unexplained irregularities or discrepancies in the books or accounts of the employee, but notice is only required after the employer has knowledge of such facts as would justify the charge of larceny or embezzlement.

2. **PRINCIPAL AND SURETY.** *Surety under indemnity bond not liable for sums owing to employer by employee discharged by improper use of employer's other funds.*

Under an employer's indemnity bond, providing that the company shall not be liable thereunder for any sum owing to the employer by the employee at the commencement of the term of the bond, or for any money thereafter used directly or indirectly by the employee to discharge in whole or in part any debt or obligation contracted or incurred by the employee with the employer before or during the term of the bond, the surety company is not liable for any sum which was owing to the employer at the commencement of the bond, and which the employee attempted to discharge by the improper use of other funds of the employer.

APPEAL from chancery court of Jones county.

HON. G. C. TANN, Chancellor.

Suit by K. C. Hall against the Maryland Casualty Company and another. Decree for complainant, and defendant named appeals. Affirmed conditionally.

*Shannon & Shauber*, for appellant.

Appellant first contends that appellee did not comply with the third clause contained in said bond, which required appellee as soon as he became aware or received any notice of any loss, which may be made a basis of a claim thereunder, to immediately notify appellant by registered letter addressed to appellant at its principal offices in Baltimore, Maryland.

We find, from our investigation of the authorities that the courts do not agree on the construction of the clause in fidelity bonds requiring immediate notice on behalf of the employer to the surety company on his having knowledge of any act of dishonesty on the part of the employee; we do find, however that there is a distinction made between bonds where the clause requires the employer when he had knowledge of the act of dishonesty and those bonds that require the employer to immediately notify the surety company when the employer becomes aware, or is notified, of any acts of dishonesty on the part of the employer.

We call the court's attention to the fact that clause three in the bond now before the court provides, that the employer on becoming aware of or upon receiving notice of, any loss which may be made the basis of any claim hereunder, shall immediately notify the company by registered letter.

In the case of *Guarantee Company of North America v. Mechanics' Saving Bank & Trust Company*, reported in Volume 46 of the United States Supreme Court reports (Lawyer's Edition), on page 253, the court through Chief Justice FULLER, in part says: "In Pauly's case, where the bond required that the company should be notified in

writing of any act on the part of the employee which may involve a loss for which the company is responsible hereunder, as soon as practical after occurrence of such act may have come to the knowledge of the employer," it was ruled that it had been properly held that the surety company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicions, of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty.

"But the bond before us not only contained that clause under consideration, which was a different and additional clause intended to secure the safety of prevention through timely warning."

It seems to us that the obvious meaning of becoming aware, as used in this bond is to be informed of, or to be apprised of, or to be put on one's guard in respect to, and that no other meaning is equally admissible under the terms of the instrument. These are the definitions of the lexicographers, distinctly deducible from the derivation of the word, aware, and that is the sense in which they are here employed. It is used in the same sense in the cashier's certificate on the renewals of the teller's bond.

To be aware is not the same as to have knowledge. The bond itself distinguishes between the two phrases, and uses them as not synonymous with each other, and in view of the plain object of the clause, we cannot regard the words as equivalent to becoming satisfied, though perhaps they may be to having reasons to believe.

The company's defense did not rest on the duty of diligence growing out of the relation of the parties, but on the breach of one of the stipulations entered into between them. The question was not merely whether the conduct of the bank was contrary to the nature of the contract, but whether it was not contrary to its terms. The Pauly case, is reported in the 42d volume of the United States Supreme Court Reports (Lawyer's Edition), on page 977.

The tenth clause in the bond is as follows: "Tenth: That the company shall not be liable under this bond for any sum or amount owing to the employer by the employee at the commencement of the term of this bond, or for funds, moneys, or personal property thereafter used directly or indirectly by the employee to reimburse the employer for any such sum, amount or deficiency, or to discharge in whole or in part any debt or obligation contracted or incurred by the employee with the employer before or during the term of this bond."

If this court should hold that appellee gave appellant the necessary notice under clause three of said bond, then we submit that appellant is entitled to a credit for the sum of sixty-four dollars the amount that McDonald, the employee, became owing appellant during the term of this bond.

It has been uniformly held by this court that it is the duty of this court to construe contracts and not make contracts for litigants. As aptly stated by Mr. Justice ETHRIDGE in the case of *Fleming v. Miller*, reported in 87 So. 277: "Of course, it is competent for parties to make such contracts as they please, not contrary to law or public policies, and each case must necessarily depend upon its own facts."

A contract containing clauses similar to those in the contract now before the court was held by this court to be reasonable and valid and conditions precedent to liability in the case of the *Maryland Casualty Company v. The Laurel Oil & Fertilizer Company*, reported in 116 Mississippi 283.

Of course, the liability of McDonald, the other defendant in the lower court is not a conditional liability and was not dependent upon the appellee's performing certain acts which he had agreed to do in the terms of the bond in this suit. The mere fact that McDonald was liable to appellee is no reason why appellee should have been given a decree against appellant. McDonald did not appeal from the decree rendered against him in favor of appellee. Ap-

pellee still has his judgment for the full amount the lower court found to be due him by McDonald.

For the reasons above stated, we respectfully submit that the lower court committed error in rendering a decree against appellant. Therefore, we respectfully ask that the case be reversed and a judgment be entered here dismissing the bill of complaint as to appellant.

W. J. Pack, for appellee.

Appellant first contends that appellee failed to comply with the third clause of the bond, wherein it is required: "That the employer on becoming aware of, or upon receiving notice of, any loss which may be made the basis of any claim hereunder, shall immediately notify the company."

In considering this case and especially in construing this bond, we invite the court's attention to the general rule of construction, and which seems to be uniformly followed. That since the bond is prepared by the company, it must be construed most strongly against the person who prepared it in case of ambiguity, etc. In the case of *The American Surety Co. v. Pauly*, 42 L. Ed. (U. S. Sup. Ct. Rep.) 977, the supreme court of the United States held in construing a similar bond:

"If looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, and agents of the surety company."

There is nothing in this record to show that K. C. Hall did not notify appellant of the shortage of McDonald as soon as he received the final proof and had the information upon which he could support a claim under the bond.

In the case of *Remington v. Fidelity & D. Co.*, 27 Wash. 429, 67 Pac. 989, it was said by the court in discussing a

similar provision in a bond: "Immediate notice ordinarily means, in this connection, within a reasonable time with due diligence under the circumstance, of a particular case, and without unnecessary or unreasonable delay, of which the jury are ordinarily to be the judges . . . And whether a time is reasonable or not depends upon the circumstances of a particular case." *Perpetual Bldg. & L. Assn. v. U. S. Fidelity & G. Co.*, 118 Iowa, 729, 92 N. W. 686; See, also, *First National Bank v. U. S. Fidelity & G. Co.*, 150 Wis. 601, 137 N. W. 742; *Rankin v. U. S. Fidelity & G. Co.*, 86 Ohio St. 267, 99 N. E. 314; *Bank of Tarboro v. Fidelity & Deposit Co.*, 120 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908.

In the case of *Fidelity & G. Co. v. Western Bank*, 29 Ky. L. Rep. 639, 94 S. W. 3, the Kentucky supreme court in construing a provision in a bond of a bank employee that the employer should, on the discovery of any act of the employee, immediately give notice thereof to the surety company, said: "The employer is not bound to report its suspicions to the insurer, even though they may be strong enough to justify in the opinion of the employer, the discharge of the employee. After suspicion is aroused, it ought to pursue its inquiries with reasonable diligence and when satisfied that the defalcation exists, and the extent, or the substantial extent, of it, notice of the fact ought to be given promptly to insurer. Notice of each item found in the course of the examination need not be instantly given. This, we think, is the reasonable construction of the clause in the bond. . . . Unless the lapse of time is so long as to be obviously a noncompliance with the contract, the question whether the notice was timely given is one for the jury. See, also, *Aetna Indemnity Co. v. J. R. Crown Coal & Min. Co.*, 83 C. C. A. 431, 154 Fed. 545; *Fidelity & C. Co. v. Bank of Timmons ville*, 71 C. C. A. 299, 139 Fed. 101; *American Surety Co. v. Pauly*, 38 U. S. App. 254, 72 Fed. 470, affirmed in 170 U. S. 133, 42 L. Ed. 977.

An exhaustive note reviewing all of the authorities on this point up to 1916 will be found in L. R. A. 1916 E. page 715. Testing the facts of this case by the rule of the law announced in the above authorities, we find that K. C. Hall did give immediate notice to appellant when he received the information that would enable him to base a claim under the bond. He did not report the discrepancy found by Williams in January, 1919, because it did not even amount to a suspicion on the part of Hall of embezzlement. Hall and Williams both thought it was a mere discrepancy.

We submit that clause 3 of the bond required immediate notice to be given only after appellee had received notice or had become aware of any loss which may be made the basis of any claim under the bond. When could any claim be made under the bond? Certainly not until such facts had come to the notice of Hall or until he had become aware of such facts as would constitute larceny or embezzlement on the part of McDonald.

Counsel cites the case of the *Guaranty Co. of N. America v. Mechanics Sav. Bank & Trust Co.*, 46 L. Ed. 253 U. S. Sup. Ct. Rep. 124, as authority for trying to make a distinction between the clause of a bond requiring the employer, when he has knowledge, and those bonds that require the employer to immediately give notice when he becomes aware of or is notified of any facts of dishonesty, etc. The bond under discussion in the *Mechanics Sav. & Trust Co. case*, *supra*, contained altogether a different clause. The employee in that instance, was a teller in a bank and the bond company undertook to contract against acts of gambling, speculation, or indulging in any disreputable and unlawful habits or pursuits. In that bond the employer was required to give notice immediately upon becoming aware of the employee being engaged in speculations or gambling. The employer in that instance would not need to have books audited and placed in balance, requiring probably weeks of painstaking investigation to ascertain whether or not he had a basis of claim under the bond, but upon receiving any information that

the employee was guilty of gambling or engaging in speculations, it became the employer's duty to immediately notify, etc. The doctrine laid down in the *Auly case, supra*, was not only cited but was approved in this case.

Counsel next contend that because McDonald and appellee adjusted the apparent discrepancy over the eighty dollar item, and Hall, under misapprehension delivered the bond to McDonald, appellee's suit should be barred.

McDonald was not a party to the contract of insurance between appellant and appellee, and was not entitled to receive the bond and the fact that Hall by error delivered the bond to McDonald could not in any way affect the rights of Hall as against the bond company for any defalcations later discovered, provided of course, these defalcations were discovered within the time limit of the bond and the proof shows that they were.

The next assignment of error pressed by counsel is that appellant should have credit for seventy-seven dollars salary paid McDonald and also for sixty-four dollars. We do not think there is any merit in this contention, because at the time this salary of seventy-seven dollars was paid, Hall did not know of any defalcation or shortage on the part of McDonald.

If he placed this money in the bank to the credit of K. C. Hall, trustee, then he must have appropriated to himself an equal amount of other funds belonging to Hall, because the chancellor found from all the facts that McDonald has embezzled one thousand, one hundred twenty-nine dollars and seventy-eight cents. There was no real conflict of testimony upon the whole in this case. It was a plain, positive case of defalcation which this court could readily see by a mere cursory examination of the record; but this fact the court will not have to find, because it has already been decided by the chancellor.

We, therefore, respectfully submit that there is no error of law shown in this record; that the facts have been found in favor of appellee by the court below and that the case should be affirmed.

WILLIAM H. COOK, J., delivered the opinion of the court.

This is an appeal from the chancery court of the Second district of Jones county. K. C. Hall, the appellee, was complainant in the court below, and the Maryland Casualty Company and Theo. McDonald were defendants. From a decree in favor of complainant, the Maryland Casualty Company prosecuted this appeal.

In June, 1918, K. C. Hall, appellee, was appointed as trustee to collect the outstanding notes and accounts due the stockholders of the Laurel Oil & Fertilizer Company, a corporation, then in voluntary liquidation. Appellee employed one Theo. McDonald to assist him in the collection of these notes and accounts, and the Maryland Casualty Company, appellant, executed a bond indemnifying the trustee against loss by reason of any acts on the part of McDonald amounting to larceny or embezzlement. McDonald entered upon the discharge of his duties on or about July 1, 1918, and the books, notes, and accounts of the Laurel Oil & Fertilizer Company were turned over to him. He continued in the employ of appellee until about January 1, 1919, and during the term of his employment he collected about one hundred and twenty-six thousand dollars. Shortly before the termination of McDonald's employment on January 1st a competent bookkeeper was employed to check the books and accounts that had been kept by McDonald, and in this checking there was discovered what was termed by the several witnesses a discrepancy or irregularity in the books and accounts, amounting to about eighty dollars, and, since McDonald failed to explain this discrepancy to the satisfaction of appellee, he declined to pay his December salary. McDonald at once entered suit in the justice court for this salary, but before the return day of this suit, appellee and McDonald reached a settlement of their differences and appellee paid McDonald his December salary and delivered to him the original bond, and McDonald dismissed the suit in the justice court.

About February 1, 1919, appellee employed accountants to make a complete audit of the books, notes, statements, and accounts which had been turned back to him by McDonald. These auditors continued their work on the books until about the middle of February, when, without completing the audit, they returned to their Memphis office. They did not return to Laurel to complete this audit until about the 1st of April, but before leaving in February they discovered certain unexplained irregularities in the books and reported these facts to appellee. On February 24th appellant wrote appellee the following letter:

"119792—Fidelity.

K. C. Hall, Theo. McDonald.

"February 24th, 1919.

Mr. K. C. Hall, Laurel, Miss.—Dear Sir: We have been advised by our Ellisville agent of possible trouble under the above bond and are accordingly attaching blank proof of loss for statement of claim.

"If McDonald had been guilty of any offenses within the terms of our obligation, kindly fill out this proof with full details as to dates, origin, and nature of the various items, and have warrant issued for his arrest, in accordance with the sixth clause of our bond.

"Yours very truly,

"EMIL L. HOEN, Manager,

"Per EDWARD J. COOLAHAN."

On February 28th appellee replied to this as follows:

"Laurel, Miss., Feb. 28, 1919.

"Maryland Casualty Company, Emil L. Hoen, Manager, Baltimore, Maryland—Dear Sir: I acknowledge receipt of your favor of the 24th inst. The matter you wrote me about is being investigated, and therefore I am not in position at this writing to make any statement."

On April 15th the auditors filed a partial report with appellee showing a shortage of about one thousand and fifty dollars, and on April 16th appellee wrote appellant as follows:

"Laurel, Miss., April 16, 1919.

"Maryland Casualty Company, Baltimore, Maryland—  
Gentlemen: In refer. to bond No. 119792, \$2,000, Theo.  
McDonald, in favor of myself.

"I beg to advise that upon a recent audit by O. P. Cobb & Co., certified public accountants, Bank of Commerce & Trust Building, Memphis, Tennessee, it develops that this party is short about one thousand and fifty dollars. The results of this audit came to my address about the 15th inst., but, being absent then, I was unable to make the report until to-day. This I am doing in compliance with the third clause or provision of the bond. Within the next few days I will either send you myself or have the auditors send you proof and affidavit of the loss in further compliance with the fourth clause or provision of the bond.

"If you desire that the proof should comply with any certain form that you have I will ask that you mail it to the above auditors, as I think now that I will have them to make the proof from their office. Yours very truly."

On April 25th appellant replied to this letter as follows:

"119792—Fidelity. K. C. Hall, Theo. McDonald.

"Mr. K. C. Hall, Box 393, Laurel, Mississippi—Dear Sir: Yours of the 18th came duly to hand and we are accordingly attaching blank proof of loss.

"As suggested in our letter of February 24th, if McDonald has been guilty of any offenses within the terms of our obligation, kindly fill out this proof with full details as to dates, origin and nature of the various items and have warrant issued for his arrest in accordance with the sixth clause of our bond.

"Yours very truly,  
"EMIL L. HOEN, Manager,  
"Per EDWARD J. COOLAHAN."

On May 3d, after appellee had received a complete and final report from the auditors, he mailed to appellant proof

of loss duly executed on blanks previously furnished by appellant. On May 9, 1919, appellant returned the proof of loss with the following letter:

"119792—Fidelity K. C. Hall, Theo. McDonald.

"Mr. K. C. Hall, Laurel, Miss.—Dear Sir: Your favor of the 3d inclosing proof of loss came duly to hand, but we are not informed by Mr. McDonald that he not only disputes this claim *in toto*, but says that some time in January it was necessary for him to file suit against you due to the fact that you were withholding his salary to apply against alleged discrepancies in his accounts, and that prior to the trial you settled the matter, releasing the bond, and returning same to the principal.

"In view of Mr. McDonald's statement, therefore, it would appear that there is no liability upon our bond, and we are accordingly returning your proof. Our request for arrest is, of course, hereby withdrawn.

Very truly yours,

"EMIL L. HOEN, Manager,

"Per EDWARD J. COOLAHAN."

Appellant earnestly insists that this cause should be reversed for the reason that appellee did not comply with the third clause of the bond sued upon, which required appellee, as soon as he became aware of, or received notice of, any loss which might be the basis of a claim thereunder, to immediately notify appellant by registered letter; these sections of the bond being as follows:

"This bond is executed by the company upon the following express conditions, which shall be deemed conditions precedent to any right of the employer to recover hereunder: . . .

"Third. That the employer on becoming aware of, or upon receiving notice of, any loss, which may be made the basis of any claim hereunder, shall immediately notify the company by registered letter addressed to the company at its principal offices in Baltimore, Maryland. . . .

"Fourth. That the claim, if any, for loss sustained shall be delivered to the company by letter addressed to the company at its principal offices in Baltimore, Maryland, within ninety days after the employer shall have become aware of, or received notice of, any loss which may be made the basis of any claim hereunder, which claim shall be accompanied by a statement of such loss, verified by affidavit. The company shall not be liable for loss caused by the employee after the employer shall have first learned of any act which may be made the basis of claim hereunder; nor shall the company be liable for loss caused by the employee after his resignation or removal."

This assignment of error calls for a construction of the meaning of the words "to become aware of any loss sustained by reason of acts of the insured constituting larceny or embezzlement." Does this provision require that, upon the discovery of any unexplained irregularity or discrepancy in the books or accounts of the employee which may create a suspicion of wrongdoing, the employer shall immediately report his suspicions to the insurer? We think not. When there are hundreds of accounts involved, where the services of trained accountants are required to check and trace the separate items of extended accounts, an immediate charge of fraud or dishonesty against an employee upon the discovery of unexplained discrepancies or irregularities in the books or accounts, or upon a suspicion of wrongdoing, would be wholly unjustified and unwarranted. To be aware of a loss sustained by reason of acts constituting larceny, or embezzlement, there must necessarily be knowledge of facts which would constitute the crime, and the charge of so serious a crime cannot safely be based upon mere inferences or suspicions arising from unexplained irregularities or discrepancies in the books or accounts of the employee, and to be aware of such loss with sufficient certainty to justify the charge of larceny or embezzlement may and probably will require considerable time for investigation after a well-founded suspicion of wrongdoing has been aroused. *American*

*Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *First National Bank v. U. S. Fidelity & Guaranty Co.*, 150 Wis. 601, 137 N. W. 742; *Rankin v. U. S. Fidelity & Guaranty Co.*, 86 Ohio St. 267, 99 N. E. 314; *Bank of Tarboro v. Fidelity & Deposit Co.*, 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682; *Fidelity & Guaranty Co., v. Western Bank (Ky.)*, 94 S. W. 3.

In determining whether the notice given complies with the requirements of the bond, the facts of each case must control. In the instant case the testimony for appellee is positive that the alleged eighty dollars discrepancy, which was discovered in December, was believed to be a mere error, and that it did not create even a suspicion in the mind of the appellee that the employee had been guilty of any intentional wrong. Under these circumstances his failure to notify appellant of this discovery did not constitute a breach of the condition of the bond.

After the employment of accountants to audit these books and accounts, and it appears from the evidence that they were employed at the suggestion of appellant's local agent, appellee was notified by these auditors that there were discrepancies in the books which they were then unable to satisfactorily explain. It appears from the correspondence hereinbefore set out that this information was also communicated to appellant's local agent, and that this local agent notified appellant that there was a probable defalcation and loss under the bond. Appellant at once wrote to appellee in reference to the matter and requested a statement of the amount of the loss or claim. Appellee immediately replied by letter stating that the matter was then under investigation, and that he was not then in a position to make them any statement. This correspondence of itself was at least notice to appellant that the affairs of this employee were under suspicion, and that an investigation to determine the facts was then in progress. Immediately upon receipt of the final report of the auditors, appellee communicated the result to appellant, and we think, under the facts in evidence in this case, that

appellee has fully complied with the conditions of the bond as to notice of loss thereunder.

Appellant next contends that the settlement in January, 1919, between appellee and McDonald, the payment of his December salary, and the delivery to him of the original bond, constituted a full settlement and release of all further liability on the bond. McDonald was not a party to the contract of insurance, and was not entitled to receive the bond, and the fact that appellee paid him the final installment of his salary and by mistake delivered to him the bond does not affect the rights of appellee against the surety for any defalcations that were afterwards discovered and of which appellee had no knowledge at the time of the settlement with McDonald.

Finally it appears that at the date of the execution of the bond the employee was indebted to appellee in the sum of sixty-four dollars, and that this item was reported by McDonald as having been paid when in fact it had not been paid and properly accounted for. The provisions of the tenth clause of the bond are as follows:

"Tenth. That the company shall not be liable under this bond for any sum or amount owing to the employer by the employee at the commencement of the term of this bond, or for funds, moneys, or personal property thereafter used directly or indirectly by the employee to reimburse the employer for any such sum, amount or deficiency, or to discharge in whole or in part any debt or obligation contracted or incurred by the employee with the employer before or during the term of this bond."

Under this provision the insurer is not liable for this item of sixty-four dollars which was owing to the employer at the commencement of the term of the bond, and which the employee attempted to discharge by the improper use of other funds of the employer, and appellee was not entitled to recover this item. If appellee will enter a *re-mittitur* of sixty-four dollars, the decree of the lower court will be affirmed; otherwise it is reversed and remanded.

*Affirmed conditionally.*

## BEALE v. YAZOO YARN MILL.

[88 South. 411, No. 21264.]

1. MASTER AND SERVANT. *"Willfully entice away or knowingly employ" servant implies actual knowledge.*

In an action brought by an employer against a third person for willfully interfering with, enticing, or knowingly employing a servant (who had entered into a contract for a given period), without obtaining the consent of the employer, it was error to charge the jury that it would find for the plaintiff if the defendant at the time of the hiring "knew or ought to have known that said contract had not expired." The words of the statute "shall willfully interfere with, entice away, or knowingly employ" mean that the party hiring must have known of the contract at the time of the hiring, and not that he might have known by diligent or reasonable inquiry. The knowledge must exist at the time of the hiring.

2. MASTER AND SERVANT. *Instruction on knowledge of prior hiring held incorrect.*

In such case it is reversible error to instruct the jury that if they believe from the evidence that the defendant had notice of any fact or circumstance sufficient to put an ordinarily prudent person upon inquiry, and that such inquiry would have developed the fact that the laborer's contract had not expired, and after such fact or circumstance came to defendant's notice he hired the tenant while the contract was in effect, to find for plaintiff. The knowledge of the first contract must exist at the time of the hiring, and mere circumstances which in themselves are insufficient to impute knowledge, but which must be coupled with other facts which would or might be disclosed by inquiry, do not supply the requisite proof.

3. MASTER AND SERVANT. *Instruction on ratification of breach of contract of hiring by continuing in service held incorrect.*

In an action by an employer against another for hiring a servant before his contract of service expired, where the evidence for the defendant showed a breach of the contract by the employer prior to the hiring by the defendant, it was error to instruct for the plaintiff that, even though the jury may believe from the evidence that one or more of the servant's family were

discharged without cause, or that the servant or members of his family were occasionally laid off without cause, and notwithstanding these facts the servants continued after such facts in the employment and worked under his contract, this constituted a ratification of the contract under its terms as originally made.

4. MASTER AND SERVANT. *Instruction on good faith as defense to charge of wrongful hiring held erroneously refused.*

Where an employer of a laborer brings an action against another for wrongful hiring of the servant of the plaintiff before the end of his term of service, and where the evidence for the defense shows, or tends to prove, that the employer breached his contract by discharging members of the servant's family, whose service is embraced in the contract, it is error to refuse the defendant an instruction to the effect that if the servant told the defendant that he and members of his family had been discharged and that plaintiff had told servant to take his boy and go to the farm, and that the defendant, in good faith, believed such statements were true at the time of the hiring the jury should find for the defendant, even though such statements were not true in fact.

APPEAL from circuit court of Yazoo county.

HON. W. H. POTTER, Judge.

Action by the Yazoo Yarn Mill against R. M. Beale Judgment for plaintiff, and defendant appeals. Reversed and remanded.

*E. L. Brown*, for appellant.

*J. G. Holmes*, for appellee.

No brief found in the record for either side.

ETHRIDGE, J., delivered the opinion of the court.

The appellee sued the appellant for knowingly employing, willfully interfering with, and enticing away employees under the provisions of section 1146, Code of 1906 (section 874, Hemingway's Code); the affidavit reciting:

"That the said defendant, without the consent of the plaintiff, heretofore willfully interfered with, enticed away, induced to leave plaintiff's employment and knowingly employed one J. S. Porter, a laborer, who was then and there under a contract of employment with the plaintiff for a specified time, said contract not having expired, the said defendant then and there well knowing that the plaintiff's contract with the said Porter has not expired. To the great damage," etc.

The contract relied on in support of the declaration reads as follows:

"This contract, made and entered into this 14th day of September A. D. 1918, by and between Yazoo Yarn Mill, party of the first part, and J. S. Porter, party of the second part, witnesseth:

"That for and in consideration of the sum of ninety dollars, cash in hand paid to the party of the second part by the party of the first part, receipt whereof is hereby acknowledged, the party of the second part hereby agrees to move himself and his family to the said mill, before the expiration of two days, and to work for the said mill for current wages to be paid himself and the members of his family; the party of the second part agrees to render good and faithful and efficient services to said mill, and agrees that two dollars and fifty cents per week, due to himself or any member of his family, for wages, may be deducted by said mill and applied on any indebtedness due said mill; that in case of controversy, or in the event of the termination of this contract, all sums due the party of the second part or any member of his family may be applied in full to any indebtedness due said mill by the party of the second part; that the party of the first part has employed the party of the second part, and the party of the second part has agreed to work for the party of the first part, at said mill, for current wages for a term beginning the 16th day of September, 1918, and ending the 1st day of May, 1919; that the services to be rendered under this contract are such

as may be prescribed by the superintendent of said mill or its overseers.

"Witness our hands this 14th day of September, 1918.

"[Signed] Yazoo Yarn Mill, by M. W. Driver, Mgr., Party of the First Part. J. S. Porter, Etta May, Estell, Eugene, by J. S. Porter, Party of Second Part."

The manager of the appellant testified to the making of the contract and to advancing Porter ninety dollars to pay off an account which he then owed for which the appellant, Beale, was responsible by way of guaranty; that he took the said Porter and his family to the mill and they entered into the service of the yarn mill. He testified that on or about the 26th day of December, 1918, he had a conversation with Mr. Beale in which he told Mr. Beale that he heard he was going to move Porter and that Beale said that was true; that he told him that if he did he would be subject to damages; that there was a law in the state and that people generally abided by court decisions and jury verdicts; that in the latter part of January Beale moved Porter upon his place, away from the mill; that Porter still owed part of the money advanced, sixty-three dollars and fifteen cents, for which this suit was brought. He denied that he had authorized Beale to hire Porter or Porter to abandon his employment, and denied breaching the contract in any respect or discharging any of the members of the family under the contract, except Porter's youngest child, whose age was such as to make it doubtful whether he could work in the mill, and except that he laid off Porter for about two hours one day after he found out he was going to quit anyway, or was dissatisfied.

Beale testified to a conversation on December 26th and gives a different version of what transpired from that of the manager, Driver. Beale says he was asked whether he was contemplating moving Porter on his farm and he told Driver, the manager, that he was; that Porter had said he could not make a living at the mill on account of not getting work for all the members of his family, and that he had promised to give him employment; that the manager

stated that he had a contract with Porter, but that he (Beale) did not know the duration of the contract; that in the conversation he told the manager that he did not contemplate moving Porter right away; that it would be all right for the mill to work Porter until about the 1st of March, and that the manager said he would be mighty glad to do that and agreed to work Porter until the 1st of March following; that afterwards he saw Porter's children idle and asked Porter why they were not working and that Porter told him they had been laid off or discharged; that after this conversation with Porter he saw Porter idle and asked why he was not working, and that Porter told him he had gone to the foreman and told the foreman unless they could work his children and give them employment that he could not work as he could not make a living without the help of his children, and that the foreman would not agree to take his son back at the mill, but told Porter to take them and go to the farm; that he was tired of fooling with them. Beale further testified that he believed in good faith what Porter had said and that he had traded with Porter believing what Porter had related as stated above. Porter corroborated Beale's statements and said he was not finally employed by Beale until after they were all laid off and the foreman had refused to re-employ his son. Porter's wife and daughter also testified, in effect, that the daughter had been discharged or laid off several different times, and that his wife had gone to the foreman and requested that he give employment to the daughter, as Mr. and Mrs. Porter had a large number of children unable to work and were dependent upon the labor of the father, mother, daughter, and two sons.

The foreman, Mr. Carpenter, also testified that he had discharged the boy, Estell, and would not take him back as he could not get work out of him; part of Carpenter's testimony being as follows:

"Q. Mr. Carpenter, what was it you told Mr. Porter that Sunday evening—you told him to take his boy and go to the cotton fields with him? A. He asked me—

"Q. Is that what you told him? A. Yes, sir; that is what I told him.

"Q. You told him just as Mr. Porter says—to take his boy and go on, and go to the cotton field? A. That I couldn't work that boy.

"Q. You say you meant for the little boy to go on to the cotton field—is that the idea? A. I meant for him to take them all.

"Q. Take them all and go? A. Yes, sir.

"Q. But finally you told him to go to the cotton patch, you didn't want him at the mill? A. I told him to take the other one and go to the cotton patch—I was not working him.

"Q. You say you meant for him to take his family to the cotton patch, and let him stay there? A. I didn't have anything to do with him.

"Q. You did have the others? A. Yes, sir.

"Q. You told him to take them to the cotton patch, you didn't want them in the mill any more—that is in substance? A. Yes, sir, I told him that.

On the trial the court gave for the plaintiff the following instructions, among others, which are complained of:

"The court instructs the jury that if you believe from a preponderance of the evidence that Porter had contracted with the plaintiff for the period beginning September 16, 1918, and ending May 1, 1919, and that before the expiration of said contract the defendant, Beale, at a time when he knew or ought to have known that said contract had not expired, employed Porter to work for him for the year 1919, without the consent of the plaintiff, then you will find for the plaintiff and assess its damage at sixty-three dollars and fifteen cents."

"The court instructs the jury that if they believe from the evidence that the defendant, Beale, had notice of any fact or circumstance sufficient to put an ordinarily prudent man upon inquiry, and that such inquiry would have developed the fact that Porter's contract with the plaintiff had not expired, and that after such fact or circum-

stance came to the notice of the defendant, Beale, the said Beale employed Porter without the consent of the plaintiff, while the contract was in effect, then you must find for the plaintiff for the full amount sued for."

"The court instructs the jury that even though you may believe from the evidence that one or more of Porter's family were discharged without cause, or that Porter or members of his family were occasionally laid off from work without cause, yet, if you further believe from the evidence that Porter did not on this account quit the employment of the plaintiff, but that he and the others of his family returned and continued to work under his contract, then such action on the part of the said Porter constituted a ratification of the contract in original terms."

"The court instructs the jury that you must find for the plaintiff in this case, unless you believe that plaintiff consented for Porter to leave its employment and go with Beale, or unless you believe that at the time Beale employed Porter the plaintiff had breached its contract with Porter, and that said contract was inoperative; provided you further believe that such employment of Porter by Beale was at a time when Beale knew or ought to have known that Porter's contract with plaintiff had not expired."

The defendant requested and was refused the following instruction:

"The court instructs the jury for the defendant that, if you believe from the testimony that J. S. Porter told the defendant, Beale, at the time he approached him to move, that the mill had discharged his daughter, and had discharged his two sons, and had laid him off, and that the foreman had told him (Porter) that he could take his boy and go to the cotton field, and that the manager, Driver, had told him to take them and go on, or words to that effect, and if you further believe from the evidence that the defendant believed, in good faith, the statement by Porter, and relied thereon, and then moved him to his place, then your verdict should be for the defendant, and

this is true whether or not the said Porter told the truth when he made these statements to the defendant."

The statute above referred to (section 1146, Code of 1906 [section 874, Hemingway's Code] reads as follows:

"If any person shall willfully interfere with, entice away, knowingly employ, or induce a laborer or renter who has contracted with another person for a specified time to leave his employer or the leased premises, before the expiration of his contract without the consent of the employer or landlord, he shall, upon conviction, be fined not less than twenty-five dollars nor more than one hundred dollars, and in addition shall be liable to the employer or landlord for all advances made by him to said renter or laborer by virtue of his contract with said renter or laborer, and for all damages which he may have sustained by reason thereof. The provisions of this section shall apply to minors under contract made by a parent or natural guardian."

The first instruction for the plaintiff, above set out, proceeds upon the idea that the statute imposes a liability where there was an employment made if the circumstances or any circumstance came to the knowledge of the person hiring that such contract existed or was in force. We think this is broader than the statute. The statute is criminal and highly penal, and its terms are not to be extended by construction. The words of the statute "shall willfully interfere with, entice away, knowingly employ, or induce a laborer," carry with them the idea that the party employing must know of the contract. The word "knowingly" does not merely refer to knowing that he is employing a party, but carries the idea that he must know of the contract, and not that he must have some knowledge of some fact which if followed up would lead to knowledge. The knowledge must exist at the time the employing takes place.

In Words and Phrases, First Series, we find the following:

"The primary definition of the word 'knowingly' is 'with knowledge.'" *West v. Wright*, 98 Ind. 335.

Again: "'Knowingly,' as used in Laws 1865, chapter 361, authorizing the bringing of actions to recover certain penalties against whoever shall knowingly sell, supply, etc., milk in an improper condition specified, should be construed to mean actual personal knowledge."

Again: "Where the president of a corporation did not know of the obstruction of a public road, and had no part therein, he is not guilty of willfully or knowingly obstructing such road."

Again: "In its ordinary acceptance the word 'knowingly,' when applied to an act or thing done, imports knowledge of the act or thing so done, as well as an evil intent or a bad purpose in doing such thing. So that a charge in an indictment that defendant knowingly deposited in the mails a printed book, etc., the character of which was obscene, lewd, and lascivious, sufficiently charges, after verdict, both that the book is in fact obscene and that the defendant knew it"—citing *Price v. United States*, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727; *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606.

Likewise the word "willfully" carries with it a knowing or conscious interference with the relation. A man cannot be said to have done an act willfully and knowingly if he does not have the actual knowledge of the relation involved. It is not sufficient that a man may know, but to do an act knowingly he must know, and it was error to give an instruction embodying the idea that he ought to have known of the contract.

The second instruction for the plaintiff, above set out, tells the jury that if Beale had notice of any fact or circumstance sufficient to put a man upon inquiry, and that such inquiry would have developed the fact that the contract had not expired, to find for the plaintiff. This is plainly error.

The fourth instruction for the plaintiff, above set out, tells the jury that even though the jury may believe that

one or more of Porter's family was discharged without cause, or was occasionally laid off without cause, yet, if they do not further believe that Porter did not on this account quit the employment, but returned and continued to work, that such return constituted a ratification of the contract in its original terms. In other words, this instruction tells the jury that, even though the plaintiff did not comply with his contract and discharged a part of the laborers, if Porter continued to work after such fact, it was equivalent to making a new contract. This instruction had no place in this trial. The contract involved called for continuous employment of the members of Porter's family, and if the plaintiff breached the contract and Porter returned to work, it in no way waived his right to recover for the time lost during the period laid off. The fact that his necessity may have forced him to work in order for him and his children to eat did not wipe out the old contract and create a new one.

The fifth instruction for the plaintiff, above set out, is also subject to criticism, in that it embraced the words "or ought to have known that Porter's contract with plaintiff had not expired."

The instruction refused for the defendant, above set out, sought to inform the jury that if Porter told the defendant, Beale, at the time he approached him to move, that the mill had discharged his daughter and his two sons and had laid him off, and that the foreman had told him (Porter) that he could take his boy and go to the cotton field, and that the manager, Driver, had told him to take them and go, or words to that effect, and that if they believed that the defendant believed, in good faith, the statements of Porter and relied thereon, and then moved him to his place, they should find for the defendant whether Porter's statement was true or not.

It seems to us that this instruction on behalf of the appellant, defendant, should have been given. As pointed out above, the statute contemplates that the willful interference or the knowingly employing must be done with

knowledge that a contract was in force at the time. If the defendant in good faith believed what Porter told him with reference to the discharge of members of his family, that is to say, if the plaintiff had breached the contract and he employed Porter under the belief that the contract was breached by the plaintiff, he would not come within the terms of the statute prohibiting such employment as the statute mentions.

It is contended by the appellee that the case of *Armistead v. Chatters*, 71 Miss. 509, 15 So. 39, is authority to the contrary. We think the present case is distinguished from the Chatters Case in that the breach in the present case involved in the above instruction is a breach on the part of the plaintiff, and it is not a case of a contract being breached by Porter if the hypothesis embraced in this instruction be true. We do not understand the Chatters case to hold what the appellee contends, and this court heretofore has not, it seems to us, so understood it.

In *Jackson v. State*, 16 So. 299, this court held that, on a trial for willfully interfering with and enticing away a servant while under contract for a specific time, the mere employment of the servant after he had left his former master is not sufficient to sustain a conviction.

In *Hoole v. Dorroh*, 75 Miss. 257, 22 So. 829, this court, in construing the statute as contained in section 1068, Code of 1892, and in holding the statute constitutional, said:

"Nor do we think the statute subject to the criticism of counsel, wherein he supposes that 'though the employer drives off the laborer, or refuses to pay him or beats him,' still the laborer is held within the grasp of the employer. The statute must have a reasonable construction. If the employer or landlord breaks his contract in some substantial respect, and especially in the ways mentioned, the laborer or tenant would be discharged from the obligation of the contract; and whatever absolves the laborer or tenant would be a shield for the protection of the new master or landlord."

Giving the statute a reasonable interpretation, it must be held that if the employer breached the contract himself he could not hold Beale for employing a laborer during the time which the contract would have to run had it not been breached. As said above, if the yarn mill had failed to employ members of Porter's family, it breached the contract. To hold otherwise would be to endanger the constitutionality of the statute and bring the decision in conflict with both the decisions of this court and those of the United States Supreme Court in construing and defining the rights of citizens under the Thirteenth and Fourteenth Amendments to the federal Constitution.

In *State v. Armistead*, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495, this court, in an opinion, declared section 1147, Code of 1906, unconstitutional as being in conflict with section 15, Constitution of Mississippi of 1890, and in conflict with the Thirteenth and Fourteenth Amendments to the federal Constitution. The court quoted with approval the language of the United States Supreme Court in *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832, in which that court said:

"The liberty mentioned in that [Fourteenth] Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The court also referred to *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191, in which the supreme court of the United States, interpreting the Thirteenth and Fourteenth Amendments, held an act of Alabama unconstitutional as being in conflict with those amendments to the federal Constitution. The supreme court of the

United States, in the *Bailey Case*, *supra*, placed such construction upon the Thirteenth and Fourteenth Amendments as gives to a laborer the right to terminate a contract for personal service, subject only to damages for its breach. Under the decision of this court, if Porter was justified in abandoning his contract for any default on the part of the mill, the employer, such would exonerate appellant in thereafter hiring Porter, though the original term or period of the contract had not expired. It is difficult to say how the appellant could be prohibited from contracting with Porter if Porter himself had a right to make the contract. However this may be, we do not feel warranted in extending the construction of the statute so as to bring it in conflict with the decisions of the federal court. Of course as long as the contract has not been breached, then third persons having knowledge of the existence of the contract may not offer inducements or do any act which will interfere with the harmonious relations under the contract. But if the contract was ended by the plaintiff's breach thereof, no action would lie for employment of the laborer. In interpreting and administering a statute the court should not construe the law or administer it so as to endanger its constitutionality.

The judgment will be reversed, and the cause remanded for a new trial.

*Reversed and remanded.*

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STATE *ex rel.* BOONE *et al.* v. METTS *et al.*

[88 South., 125, No. 21885.]

1. MUNICIPAL CORPORATIONS. *New census may be ordered by Governor to reclassify municipalities only when returns show change in classification.*

Under sections 3308 and 3311, Code of 1906 (sections 5804 and 5808, Hemingway's Code), the census return must show a change in the classification of a municipality before the Governor is em-

powered to act in the matter. It is only when this change is thus shown that the Governor can investigate the matter, have a new census taken, and reclassify the municipality.

2. MUNICIPAL CORPORATIONS. *Governor not authorized to reclassify city under census returns as made.*

Where a municipality was classed as a city before the federal census of 1920 was taken, and the final return of this census showed it to be still a city, the Governor is without power to appoint a person to take a new census of the municipality or to reclassify it under these sections of the Code.

APPEAL from circuit court of Lafayette county.

HON. W. A. ROANE, Judge.

*Quo warranto* by the state, on the relation of O. B. Boone and others, against T. J. Metts and others. Judgment for defendants on demurrer, and relators appeal. Affirmed.

*Clayton D. Potter*, for appellant.

*L. C. Andrews* and *Harry M. Byan*, for appellees.

No brief found in the record for either side.

SYKES, J., delivered the opinion of the court.

The appellants instituted a *quo warranto* proceeding in the circuit court of Lafayette county, seeking to oust the city officials of the municipality of Oxford and obtain possession of these offices.

The facts shown by the information and the exhibits thereto are as follows: That the municipality of Oxford prior to the taking of the federal census in the year 1920 had a population of more than two thousand people and had adopted the commission form of government provided for by chapter 120 of the Laws of 1912 (sections 6038 to 6067, inclusive, Hemingway's Code); that the Governor, believing that the final federal census return was fraudulent, appointed P. B. Furr to take a census of this munic-

ipality; that the final federal census return showed this municipality to have a population of over two thousand inhabitants, and the census taken by Mr. Furr, under the appointment of the Governor, showed the municipality to have a population of less than two thousand inhabitants. Upon this census return of Mr. Furr the Governor changed the classification of the Municipality of Oxford from a city to a town and appointed these appellants as its officers. A copy of the proclamation of the Governor is attached to the information. It appears in this proclamation that the final census returns of the federal government showed the municipality of Oxford to have over two thousand inhabitants, and that the Governor believed these returns were fraudulent because they purported to show, and did show, a larger number of people in this municipality than the Governor believed it contained, for which reason the Governor appointed Mr. Furr to take a new census, and that this census showed the total number of inhabitants of Oxford to be eighteen hundred and seven.

It will be noted that before the taking of this federal census this municipality was a city, and that the final federal census returns showed it still to be a city; in other words, this census return did not show a change in the class to which this municipality belonged.

A demurrer was sustained to this information in the circuit court, and, the appellants declining to amend, judgment final was rendered in that court, from which judgment the case is appealed here.

The contentions of the appellants are thus summarized in the brief of their able counsel:

"The only questions presented in this case are whether or not the Governor was acting within the authority conferred on him: First, in demoting the municipality of Oxford from a city to a town; and second, if he had the authority to so demote the municipality under the facts presented in this suit, did he have the power to appoint the

mayor and board of aldermen of the municipality of Oxford?"

It is only necessary for us to deal with the first question above presented, viz: Whether or not under the facts in this case the Governor, under the law, was authorized or possessed the power and authority to demote the municipality of Oxford from a city to a town.

Section 88 of the Constitution provides that the legislature shall pass general laws under which cities and towns may be chartered and their charters amended.

Section 3312 of the Code of 1906 (section 5809, Hemingway's Code), prescribes for the incorporation of cities, towns, and villages. It is therein provided that petitions shall be prepared addressed to the Governor setting out, among other things, the metes and bounds, the number of inhabitants, etc., which petitions must be signed by two-thirds of the qualified electors of the proposed municipality and be published in a newspaper (if there be a newspaper) three weeks. The petition with proof of publication is then presented to the Governor to be acted upon. Further proceedings may be had before the Governor as provided in this act. It is then provided that he issue his proclamation incorporating the city, town, or village, and therein defining the metes and bounds, and further providing for the appointment of municipal officers. This section of the Code in the case of *Jackson v. Whiting*, 84 Miss. 163, 36 So. 611, was held to be constitutional. In that case it is stated that:

"The law in question does not require the Governor to do aught more than decide the question of fact as to whether or no the petition presented to him is sufficient and sufficiently signed, and if it has been posted or published as required therein. These questions being determined affirmatively, the Governor shall, not may, issue his proclamation declaring such village incorporated, and 'defining its limits and boundaries.'"

Under this section the Governor cannot initiate the proceedings which result in the incorporation of munic-

ipalities. These proceedings are initiated by the inhabitants thereof, and the Governor is only empowered to act when the petition for incorporation is presented to him.

Section 3308, Code of 1906 (section 5804, Hemingway's Code), together with the three following sections 3309, 3310, 3311, Code of 1906 (sections 5805-5808, Hemingway's Code), provide for a change in the classification of a municipality and for its abolishment. The power of the Governor to act in this case is to be determined from a consideration of these four sections.

Section 3308, Code of 1906 (section 5804, Hemingway's Code), reads as follows:

"Whenever by a census taken under an act of Congress or of the legislature it shall be shown that the population of a city, town, or village has increased or diminished so as to take or place such city, town or village out of the class to which heretofore it has belonged, or whenever the same is shown by a census of such city, town, or village taken under the direction of the municipal authorities thereof and approved by them as correct, the municipal authorities thereof shall certify the facts to the Governor, who shall investigate the matter; and if he find the municipality to be wrongfully classed he shall issue his proclamation in accordance with the facts, and shall correctly classify it, transmitting a copy of the proclamation to the mayor of such city, town or village."

This section deals with three different kinds of a census: The first, one taken under an act of Congress (as the one under consideration in this case); second, one taken under an act of the legislature; third, one taken by the authorities of the city, town, or village. When by a census taken in any one of these three ways "it shall be shown that the population of a city, town or village has increased or diminished so as to take or place such city, town or village out of the class to which heretofore it had belonged," then, and not until then, is the Governor empowered to act in any way in the matter.

It is unnecessary for us to decide in this case whether or not the Governor is empowered to act only after the census return which shows a change in the classification of a municipality has been certified to him by the municipal authorities, or whether such certification relates alone to a census taken under the direction of the municipal authorities, and does not refer to a census taken under federal or legislative authority, for the reason that the census itself must show a change in the classification of a municipality before the Governor is empowered to act in the matter. It is only when this change is shown that the Governor can investigate the matter and reclassify the municipality.

Section 3311, Code of 1906 (section 5808, Hemingway's Code), is as follows:

"In the performance of his duties under this chapter, the Governor shall not be bound by the returns of a census, if he be of opinion that the same are fraudulent. In such case he may appoint a competent person to take a correct census of the municipality, and verify the same by affidavit and submit it to the Governor, and on this report he shall classify or abolish municipalities accordingly. The cost of taking the census shall be paid by the municipality."

The performance of the duties of the Governor under this chapter, mentioned in this section, merely relate to the duties he is called upon to perform where there has been a change in the municipality as provided in section 3308, or for the abolishment of the municipality provided for in section 3310.

The authority of the Governor with reference to the reclassifying of the municipality is found in these two sections of the Code of 1906 (3308 and 3311). Under these sections, until a census return has shown either such an increase or decrease in the population as indicates that it now belongs to a different class of municipality, then, and not until then, is the Governor empowered to act. Whether the Governor has been vested with the power and jurisdiction to reclassify this municipality is a judicial

question to be determined by the court. 7 R. C. L. p. 1050, section 85, and authorities cited thereunder.

The federal census return showed no such change in the municipality of Oxford. It was a city before the census was taken, and the final census showed it to be still a city. The Governor therefore had no power to act in the matter. The powers of the Governor with reference to the incorporation of municipalities are prescribed in sec. 3312 of the Code of 1906, sec. 5809, Hemingway's Code. The jurisdictional facts which give him the power to act in that instance, viz. the petition, etc., are enumerated in that section. His powers with reference to abolishing municipalities are set out in sections 3310 and 3311 of the Code of 1906, and his powers to reclassify, based upon a change as shown by a census, are governed by sections 3308 and 3311 of the Code. Under these sections are prescribed the duties of the Governor with reference to the incorporation, change of classification, and abolishment of municipalities.

The judgment of the circuit court is affirmed.

*Affirmed.*

ETHRIDGE, J. *dissenting*.

I am unable to agree with the majority, and base my disagreement upon two propositions: First, that the classification of cities is a political question entirely for the determination of the political department of the government, which action is not subject to review by the judicial department; and, second, if mistaken in this position, that the petition for *quo warranto* and the proclamation attached thereto, to which a demurrer was sustained, states a cause of action, and, if any defense can be made to it, or any attack made upon the classification, it must be done by pleading the facts which would show that the Governor's action was unauthorized and erroneous.

In Cooley's Constitutional Law (1898 Ed.), at page 157, under the heading "Political Questions," it is said:

"Over political questions the courts have no authority, but must accept the determination of the political departments of the government as conclusive. Such are the questions of the existence of war, the restoration of peace, the *de facto* or rightful government of another country, the authority of foreign ambassadors and ministers, the admission of a state to the Union, the restoration to constitutional relations of a state lately in rebellion," etc.

See, also, *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581; *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187; *Marshall v. Dye*, 231 U. S. 250, 34 Sup. Ct. 92, 58 L. Ed. 206; *State of Mississippi v. Stanton*, 6 Wall. 50, 18 L. Ed. 721; *Pacific States Tel. Co. v. Oregon*, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377; *Kierman v. Portland*, 223 U. S. 151, 32 Sup. Ct. 231, 56 L. Ed. 386, which cases will receive further attention later in this opinion.

In order to present my views on this question clearly, it will be necessary to set out a portion of the petition for *quo warranto* and a portion of the Governor's proclamation and some of the statutes bearing upon the subject. From the petition I quote the following:

"That on the — day of January, 1921, L. M. Russell, Governor of Mississippi, acting on authority conferred on him by law, issued a public proclamation appointing P. B. Furr to take a census of the town of Oxford; the said Governor in said proclamation appointed P. B. Furr, stating that he believed that the census as taken by the United States was fraudulent; and the census having been taken under order of the Governor by the said P. B. Furr, certified by him and properly verified, and it appearing that the said town of Oxford has a population of less than two thousand inhabitants, that the said Governor issued his proclamation demoting the said city of Oxford to the town of Oxford, and that proclamation has been spread on the minutes of said municipality as required by law.

"The relator would further show that the said town of Oxford, the erstwhile city of Oxford, was up to the time

of said proclamation operated under Laws of 1912, chapter 120, providing for the commission form of government.

"Your relator further charges that the said chapter 120 of the Laws of 1912, providing for the commission form of government, is applicable only to municipalities of the class of cities, and not towns."

From the proclamation attached to the petition I quote the following:

"Whereas, by virtue of the authority vested in me under the Constitution and Laws of the state of Mississippi, and especially by virtue of section 3311 of the Code of 1906 (Hemingway's Code, section 5808), I, as Governor of the state of Mississippi, on December 22, 1920, designated Mr. P. B. Furr, of Oxford, Lafayette county, Miss., he being a competent person, to take a correct census of the municipality of Oxford, by an instrument in writing to this effect, for the reason that I believed that the final census returns of the United States government as to said municipality were fraudulent, in that it purported to show and did show a larger number of persons in said municipality than the number of two thousand, when in truth and in fact I was of the opinion that there were many less than this number of persons in said municipality; and

"Whereas, the said P. B. Furr, by virtue of the said instrument in writing, has performed his duty in taking what I deem to be a correct census of said municipality, and has filed with me an instrument, the same being a numerical list of the names of all citizens in said municipality, and has verified same by an affidavit and submitted such instrument to me as the result of his labors in taking said census, which said numerical list shows the total number of persons in said municipality to be 1807, and therefore the municipality of Oxford is not entitled to be classified as a 'city,' but only as a 'town,' and hence should be reclassified accordingly."

Section 3299, Code of 1906 (section 5795, Hemingway's Code), classifies municipalities under cities, towns, and

villages, and provides that municipalities having two thousand or more are cities, and those having less than two thousand and not less than three hundred are towns.

Section 3308, Code of 1906 (section 5804, Hemingway's Code), provides how to determine to which class a municipality belongs and reads as follows:

"Whenever by a census taken under an act of Congress or of the legislature it shall be shown that the population of a city, town, or village has increased or diminished so as to take or place such city, town or village out of the class to which heretofore it has belonged, or whenever the same is shown by a census of such city, town, or village taken under the direction of the municipal authorities thereof and approved by them as correct, the municipal authorities thereof shall certify the facts to the Governor, who shall investigate the matter; and if he find the municipality to be wrongfully classed he shall issue his proclamation in accordance with the facts, and shall correctly classify it, transmitting a copy of the proclamation to the mayor of such city, town, or village."

Section 3309, Code of 1906 (section 5805, Hemingway's Code), provides that the proclamation shall be published and recorded as an ordinance is published and recorded, and "shall be conclusive from its issuance of the matter determined by it, until there be a new classification under the provisions of this chapter."

Section 3310, Code of 1906 (sections 5806 and 5807, Hemingway's Code), provides that:

"If in any case the census show that a municipality hereafter created contains less than one hundred inhabitants, the Governor shall issue his proclamation abolishing the same," etc.

Section 3311, Code of 1906 (section 5808, Hemingway's Code), reads as follows:

"In the performance of his duties under this chapter, the Governor shall not be bound by the returns of a census, if he be of opinion that the same are fraudulent. In such case he may appoint a competent person to take a correct

census of the municipality, and verify the same by affidavit and submit it to the Governor, and on this report he shall classify or abolish municipalitites accordingly. The cost of taking the census shall be paid by the municipality."

Other provisions of chapter deal with the incorporation of municipalities and impose duties upon the Governor.

It will be noted from reading section 3308, Code of 1906, that the language of the section is involved, and it is somewhat difficult to tell with exactness whether or not a census taken by the United States shall be certified by the municipal authorities to the Governor, but it is manifest to my mind that the section did not intend to confer a power or impose a duty on a municipality to certify to the Governor the result of the census of the United States or by the state of Mississippi, but only required the municipality to certify to the correctness of the census taken by its own authority. The purpose of the section, as I understand it, is to confer on the Governor the power to reclassify municipalities after each census either by Congress or by the state, and, if the Governor believes from any information that the census is fraudulent, that he shall appoint a person to verify the census by enumerating the inhabitants. The statute did not contemplate that the Governor could take this action when the fraud was committed one way, and not be able to checkmate the fraud when it operated the other way. This view is especially strengthened when we consider the language of the other sections between 3308 and 3311 and those sections which follow section 3311.

Under section 3311, Code of 1906 (section 5808, Hemingway's Code), it will be noted that in the performance of his duties under this chapter of the Code the Governor shall not be bound by the returns of the census if he be of the opinion that the same are fraudulent. This is not a part of section 3308, but it is a comprehensive section dealing with all census having to do with municipal populations and gives the Governor full power to insure accuracy in the populations so that they may be properly

classified. In some of the sections above referred to, it says "if it appear from the census" just as it says "shall be shown" that the population of a municipality has increased or diminished in section 3308. It would be folly to attribute to the legislature the purpose to give the Governor in one statute the authority to review a census, and not in another. The statute does not anywhere require the Governor to proceed upon notice or to be informed by any person or set of persons other than as to a census taken by the municipal authorities.

The classifications of cities is purely a political matter. The powers of cities in many respects are dependent upon their population, and it is highly important that the classification be made final, and the express language of section 3309, Code of 1906, makes it final until a new classification is arrived at in the manner provided. It was never contemplated that the Governor would proceed upon notice and hearing, nor that he would proceed with the technical precision required in legal proceedings. The legislature has full power to classify municipalities and make its action final, and of course it may make the action through such agency as it may provide and make its agent's action final.

In judicial proceedings involving special statutory powers the pleadings must show jurisdiction, but that does not apply to executive action.

In the case of *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581, the question was presented to the judicial department of the national government to determine whether or not one of the states had a republican form of government under article 4, section 4, of the United States Constitution, which provides:

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

It seems to me that it was highly important in that case to determine who rightfully constituted the state government. Every citizen, and especially every taxpayer, was vitally interested in knowing to what government or to what authority he owed allegiance, but the court in a learned opinion held that that question was for the political department of the government, that is, the national Congress; that it was not a judicial question.

In the cases of *Georgia v. Stanton* and *Mississippi v. Stanton*, 6 Wall. 50, 18 L. Ed. 721, the states of Georgia and Mississippi sought to obtain a decision from the United States supreme court as to their *status* as states and to enjoin the usurpation of authority by the national Congress and officers of the national government, and the court held that it was without jurisdiction because that question was a political question, and not a judicial question; that the judicial power could only be exercised when the rights which were in danger were the rights of persons or property, and not merely political rights; that, where a bill called for the judgment of the court upon political questions and upon rights not of person or property, but of a political character, the court possessed no jurisdiction over the subject-matter presented in the bill for relief. It was much more important to the people of the states to have the question settled judicially than it is in the case before us.

The case of *Taylor v. Beckham*, 107 U. S. 548, 20 Sup. Ct. 890, 44 L. Ed. 1187, was a case where Taylor was claimant for the Governor's office of Kentucky. The Legislature declared Goebel elected. Goebel having been killed, Beckham, who was Lieutenant Governor, was entitled to succeed Goebel in office, and brought suit in *quo warranto* against Taylor to obtain possession of the office. The court of Kentucky decided favorably to Beckham, and Taylor appealed to the federal supreme court. Under the Constitution of Kentucky and under the decisions of the court of that state, the legislature was the final judge of who was elected Governor. Mr.

Chief Justice FULLER of the United States supreme court in a learned opinion held that a decision by a state tribunal against the claimant to office does not deprive him of any right to property within the meaning of the United States Constitution, Amendment 14, so as to give the federal supreme court jurisdiction on writ of error; also that section 4 of article 4, United States Constitution, guaranteeing a republican form of government, did not authorize the federal court to entertain jurisdiction, and that the controversy was a political, and not a judicial, controversy.

*Pacific States Tel. Co. v. Oregon*, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377, was a case where the telephone company sought to challenge the validity of legislation enacted through the initiative and referendum on the ground that this law violated section 4, art. 4, of the United States Constitution, guaranteeing a republican form of government. The court again reviewed the authorities upon the question, and again held that this presented a political question, and not a judicial question. The reasoning of the opinion is very convincing, and shows the danger of the courts undertaking jurisdiction of controversies which do not properly belong to them. To the same effect are *Kierman v. Portland*, 223 U. S. 151, 32 Sup. Ct. 231, 56 L. Ed. 386, and *Marshall v. Dye*, 231 U. S. 250, 34 Sup. Ct. 92, 58 L. Ed. 206.

The supreme court of this state, in *State v. Dinkins*, 77 Miss. 874, 27 So. 832, discusses this subject and calls attention to the binding effect of decisions of the political department in matters conferred upon them by law. The case arose out of an action against the state to recover a reward offered by the government for the capture and conviction of an absconding criminal. One-half of the reward was to be paid on delivery of the escaped criminal to the sheriff, and the other half upon conviction. There was a conviction, but the Governor declined to pay the one-half of the reward offered on condition of conviction and suit was brought against the state. The court quoted

in its opinion from Judge COOLEY, the eminent constitutional lawyer, in a case decided by the Michigan court, of which he was then a member, saying:

“The law must leave the final decision upon every claim and every controversy somewhere, and, when that decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial. The party applying for action, which, under the Constitution and laws, depends on the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy, and must submit to the decision.’ *Sutherland v. Governor*, 29 Mich. 320, 330. The reasoning of the court in this class of cases proceeds upon the principle that the legislative, executive, and judicial branches of government are co-ordinate, equal, separate, and independent departments of the government, and that the powers and duties of one of these departments cannot be performed through the instrumentalities of one of the other departments of the government. For if the authority confided to any one department of government may be exercised by another department of the government, the integrity and independence of the department whose powers are usurped by the other are lost and destroyed. This cardinal principle of constitutional governments among the American states is sustained by reasoning of unsurpassed ability by the judges in the Michigan case above cited, and in *Hawkins v. Governor*, 1 Ark. 570, and *State v. Governor*, 25 N. J. 331.

“All the duties enjoined upon the chief executive of the state are imposed by the Constitution or by law. They are political in their nature, not ministerial, and are of such administrative character that they are wholly confided to his sole judgment and discretion. In *Vicksburg, etc., R. Co. v. Lowry*, 61 Miss. 102. Chief Justice CAMPBELL emphasized the integrity and independence of the head of the executive branch of the government by declaring that the Governor could not be compelled to do any act.

"Undoubtedly we indulge the presumption, as it is our duty and pleasure to do, that the Governor rightly refused his order in the instance here before the court. The record discloses that the person arrested surrendered himself upon an understanding had with his counsel that a part of the reward was to be applied to the making of his defense. If the case had been one of which the court had jurisdiction, the verdict should have been for the state. But we do not rest our decision upon that ground. We prefer to place it distinctly upon the ground that the action of the executive cannot be coerced, nor can the effect of his refusal to act be evaded by an application to the judicial department of the government. What cannot be done directly should not be done by indirection."

See, also, *Ramey v. Woodward*, 90 Miss. 777, 44 So. 769; *State v. Brown*, 90 Miss. 876, 44 So. 769.

The court further decided in *V. & M. R. R. Co. v. Lowry*, 61 Miss. 102, 48 Am. Rep. 76, that the Governor could not be controlled in the performance of ministerial duties by the courts; that he was a separate department of the government, and not subject to the control of the courts. There are many decisions in this state to the same effect as to different functions of the legislative and executive departments.

Section 70 of the Constitution provides that no revenue bill nor any bill providing for any assessment of property for taxation shall become a law except by three-fifths of the members of each house present and voting, but the court held in *Hunt v. Wright*, 70 Miss. 298, 11 So. 608, that, while this section was binding on the legislature, the court could not take cognizance of the matter where the legislature disregarded the Constitution, and that the legislature could not be controlled by the court on such question, but the decision of that question was entirely for the legislature.

Section 71 of the Constitution provides that every bill shall have a title, etc., but the court held that the title and the sufficiency thereof is a legislative, and not a ju-

dicial, question. *Lang v. Board of Supervisors*, 114 Miss. 341, 75 So. 126; *State v. Phillips*, 109 Miss. 22, 67 So. 651, L. R. A. 1915D, 530; *University v. Waugh*, 105 Miss. 623, 62 So. 827, L. R. A. 1915D, 588; *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825.

It has also been held, even where the personal liberty of the citizen was affected, that the Governor's warrant ordering the arrest precluded the defendant from showing that he was not within the state where the alleged crime was committed at the time of the commission thereof. *Ex parte Edwards*, 91 Miss. 621, 44 So. 827; *Ex parte Devine*, 74 Miss. 715, 22 So. 3.

Political questions as distinguished from judicial questions deal with political rights as distinguished from personal and property rights. See "Political Questions" and "Political Rights," Words and Phrases, First and Second Series, and Bouvier's Dictionary (3d Ed.).

The Governor has many questions to decide in the performance of his duties, and his decisions on these questions are final and conclusive on the other departments of the Government. For instance, he is limited in granting a pardon to such cases as where publications have been made for thirty days in a newspaper of the county, but his decision as to whether the publication was made is not open to judicial review. Many other duties involve inquiry into facts, but his decision upon such facts are binding unless they invade the rights of the citizen to life, liberty, and property. He even has the power to declare martial law, and to displace civil authority. In doing so his decision is final and conclusive, subject only to the power of the legislature to impeach him for abuse of his power.

In the case of *Ocean Steam Navigation Co. v. Strahan*, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013, it was held by the United States supreme court that Congress would lawfully confer upon the Secretary of Commerce and Labor power to enforce, without invoking judicial aid, the penalty imposed by the act of March 3, 1903 (32 Stats. at

Large, 1213, chapter 1012, section 9), for bringing into the United States an alien afflicted with dangerous diseases, etc. To the same effect is *International Mercantile Marine Co. v. Stranahan*, 214 U. S. 344, 29 Sup. Ct. 678, 53 L. Ed. 1024. Many other authorities could be cited with analogous holdings, but would unduly protract this opinion.

On the second proposition I desire to say that the executive proclamation and the allegations of the petition for *quo warranto* make a *prima facie* case at least good against demurrer. If the act of the Governor is subject to judicial review at all, it devolved upon the defendants to set forth the facts by proper pleading which would show that the conditions for its exercise did not exist. This position is distinctly upheld by the cases of *Ex parte Edwards*, 91 Miss. 621, 44 So. 827, and *Ex parte Devine*, 74 Miss. 715, 22 So. 3.

Under our system of tripartite government, confiding the executive powers to one department, the legislative to another, and the judicial to a third department, it is important to decline jurisdiction of controversies not properly belonging to the court. The executive of the state is elected by all the people of the state, that is to say, by a majority of them, while each member of this court is elected by a minority of the people, being only required to have a majority of the voters of a district composed of one-third of the people of the state.

The fidelity with which the judiciary has discharged its duties has often made people seek the aid of the judiciary in questions of a purely political nature, and sometimes, though in rare instances, the court has not properly discriminated between its own functions and those of the other departments. Judges at last are but men subject to the imperfections and frailties of other men, encompassed by error, seasoned with sin, and fettered by fallibility; therefore they should act with caution in taking cognizance of controversies to see that they do not encroach upon the functions of the other departments of government.

LINCOLN COUNTY v. WILSON *et al.*

[88 South. 516, No. 21933.]

1. SCHOOLS AND SCHOOL DISTRICTS. *In proceedings to validate bond issue, legality of district cannot be inquired into beyond record of organization.*

In a proceeding under chapter 28, Laws Ex. Sess. 1917, to validate bonds issued by the board of supervisors for a consolidated school district, such school district having, under the law, been organized by the county board of education, any attack made on the organization of such school district is a collateral attack; therefore in such validation proceeding there can be no inquiry as to the legality of the organization of the consolidated school district beyond what the record of its organization by the board of education shows on its face.

2. SCHOOLS AND SCHOOL DISTRICTS. *Date of resolution for issue of bonds of consolidated district held not to render issue void.*

The fact that the resolution of the board of supervisors declaring its purpose to issue bonds for a consolidated school district under chapter 207, Laws of 1920, antedates by four days the resolution of the county board of education organizing such consolidated school district, the former resolution not having been published until after the resolution organizing the school district had been adopted, was not fundamental, but a mere irregularity, and did not render the bonds of said school district void.

APPEAL from chancery court of Lincoln county.

HON V. J. STRICKLER, Chancellor.

Proceedings by the state's bond attorney to validate school district bonds to which J. P. Wilson and other objected. Objection sustained, and from a decree holding the bonds invalid, the board of supervisors of Lincoln county, on behalf of the School District appeals. Reversed and rendered.

*H. Cassidy*, for appellant.

*P. Z. Jones*, for appellee.

No brief found in the record for either side.

ANDERSON, J., delivered the opinion of the court.

This is a proceeding by the state's bond attorney under chapter 28, Laws Ex. Sess. 1917, to validate seven thousand dollar bonds of the Arlington consolidated school district of Lincoln county, issued under chapter 207, Laws of 1920, for the purpose of erecting a school building for said school district.

On the hearing before the chancery court the appellees, taxpayers of said school district, appeared and filed objections to the validation of the bonds. The objections of the appellees were sustained, and the court rendered a decree holding the bonds invalid, from which the board of supervisors on behalf of the school district appeals.

Only two objections to the validity of these bonds are urged and argued in this court. One is that there was no Arlington consolidated school district, and therefore no authority for the issuance of the bonds in question; the other that the order of the board of supervisors declaring its intention to issue the bonds appears on the minutes of the board to have been adopted on the 5th day of July, 1920, before the organization of the Arlington consolidated school district by the county board of education, the minutes of that board showing that the district was not organized until the 9th day of July, 1920; and therefore the whole proceeding is void. The controlling facts in the case are undisputed. Therefore the record presents only questions of law. The facts are substantially as follows: The bonds involved were sought to be issued under chapter 207 of the Laws of 1920. Until the 9th day of July, 1920, there was no Arlington consolidated school district. There was, however, the Arlington school district, an ordinary rural school district. For the purpose of making a consolidated school district out of the territory contained in this school district, the board of education met on July 9, 1920, and passed an order carving out of it a part of its

territory, which the board designated in its order as the Brent school district. The board of education then adjourned, and on the same day the county superintendent of education called it together in another meeting. At this meeting another order or resolution was passed consolidating the territory in the Arlington school district and the Brent school district into one school district, calling it the Arlington consolidated school district. These facts are shown by the minutes of the county board of education. In addition it was shown by parol testimony that the board of education took this action at these two meetings for the purpose alone of meeting what they were advised were the requirements of the law as declared by this court in *Trustees of Walton School v. Covington County*, 115 Miss. 117, 75 So. 833, to the effect that it took two or more rural school districts to constitute a consolidated school district; in fact, it was clearly shown that this action was taken for the purpose of evading the holding of the court in this case.

The minutes of the board of supervisors show that the resolution passed by it declaring its purpose to issue the bonds of the Arlington consolidated school district was adopted on July 5, 1920, four days before the formation of the consolidated school district. The parol testimony, however, shows that this order of the board of supervisors was in fact adopted on July 9, 1920, the same date the board of education formed the consolidated school district. The clerk of the board testified that this occurred through mere error of his in filing and entering the resolution on its minutes.

The first question which will be considered is whether in a proceeding under chapter 28, Laws of 1917, to validate these school bonds the organization by the county board of education of the consolidated school district can be attacked.

It should be borne in mind that the organization of the school district was by one authority, the county board of education, while the proceedings to issue the bonds were

by another and different authority, the board of supervisors of the county; and it should also be remembered that under our law a consolidated school district may be conducted as a consolidated school district for an indefinite length of time without issuing bonds, or it may issue bonds at once, or it may conduct its affairs for a time without issuing bonds, and then issue them. It cannot be said that the action of the board of education in forming a consolidated school district is a part of the proceedings by the board of supervisors to issue bonds of such district.

The purpose of chapter 28, Laws of 1917, is to authorize a test of the validity of the proceedings to issue bonds of the character therein described had before the body or authority issuing such bonds.

Where in a case like this the district for which the bonds are to be issued was organized by one authority, and the bonds issued by another and different authority, under this statute there can be no inquiry into the legality of the formation of the district beyond what the record shows on its face; for that question only arises collaterally. If, therefore, according to the face of the proceedings before the board of education there is a valid consolidated school district, that is the end of the inquiry. It is inconceivable that the legislature intended by this bond validation statute to open up for review by the chancery court not only the proceedings to issue bonds had by the authority issuing them, but, in addition, the legality of the organization of the district for which the bonds are issued, where the district is organized by one authority and the bonds issued by another. If this were true in a proceeding to validate county or municipal bonds of any character under this statute, the validity of the organization of the county or municipality could be inquired into.

This is analogous to the question involved in *Dye et al. v. Town of Sardis*, 119 Miss. 359, 80 So. 761. In that case there was a collateral attack on the bonds of the Sardis separate school district because it was contended that the district was illegally organized. This court held that the

separate school district had been created under legislative authority and had become an instrumentality of the government for school purposes. That being an arm of the state government, the legality of the organization of the district could not be attacked collaterally.

The proceedings of the board of education are valid on their face. They show a legal consolidated school district with the required territory. This being a collateral attack on the organization of the district, it follows, even if it be true that the district was fraudulently organized, that fact cannot be considered for the reasons stated.

It is true that the resolution declaring the purpose of the board of supervisors to issue the bonds antedates by four days the resolution of the county board of education organizing the consolidated school district. But the record shows that the school district was organized on July 9, 1920, and the resolution of the board of supervisors declaring its purpose to issue the bonds, although appearing on the minutes of the board of supervisors under date of July 5, 1920, was not published until July 10, 1920.

Section 2 of chapter 207, Laws of 1920, under which these proceedings were had to issue bonds, provides, among other things, that:

"Before issuing said bonds, the board of supervisors shall, by resolution, spread upon its minutes, declare its intention of issuing said bonds," etc.

This resolution was spread on the minutes before the order issuing the bonds, and also before the publication of the notice of the intention to issue the bonds was entered thereon. This irregularity is not fundamental. No harm to any taxpayer could result therefrom. Our opinion is it does not affect the validity of the bonds.

*Reversed, and decree here for appellant.*

## MOORE v. SWAMP DREDGING CO. Inc.

[88 South. 522, No. 21825.]

1. DRAINS. *Landowner held not entitled to damages to crops through enlargement of canal.*

The landowner adjoining a right of way of a drainage canal cannot recover damages for injuries sustained to his crops caused by the damming up of the canal, which was made necessary in order to enlarge and dig deeper the canal, when this work is done in a proper workmanlike manner, in accordance with the plan legally adopted for its performance by the drainage commissioners. For all of this damage he, or his predecessor in title, is supposed to have been paid when the right of way was granted to the drainage district.

2. DRAINS. *Successor of grantor to drainage district cannot sue for damages from construction or maintenance.*

When a landowner has granted to a drainage district a right of way over his land for the purpose of constructing and maintaining canals and ditches, his successor in title cannot thereafter sue the district or the contractor for damages which resulted, either from its construction or maintenance, if the work was done in a proper workmanlike manner. All these damages caused to the landowner are presumed to have been paid for because of the grant.

3. DRAINS. *No action by landowner for damages for construction or maintenance of ditches in proper workmanlike manner.*

Though the landowner may be damaged because of the doing of this work in a proper workmanlike manner, there was no invasion of his legal rights, and it is a case of *damnum absque injuria*, for which no action may be maintained.

4. DRAINS. *Drainage district must exercise reasonable care and skill.*

In the exercise of its privileges and powers a drainage district must exercise reasonable care and skill, and, if it be necessary to do a particular act in a particular manner, it may do so, though evil may result to others; but if the same act may as easily be done in another way, without hurt to others, it is the duty of the drainage district to adopt the nonhurtful method of exercising its powers.

5. CORPORATIONS. *Corporation may use own as it will, if it does not injure others.*

A corporation, as well as an individual landowner, within its charter powers, has the right to so use its own as it will, qualified by the duty to so use it as not to injure others, if that be reasonably within its power.

APPEAL from circuit court of Lee county.

HON. C. P. LONG, Judge.

Action by C. B. Moore against the Swamp Dredging Company, Incorporated, and others. Judgment on a peremptory instruction for defendants, and plaintiff appeals. Affirmed.

*Claude Clayton*, Atty., for appellant.

It will also be observed that this appeal is predicated and based solely upon section seventeen of our constitution which provides: "That private property shall not be taken or damaged for public use," etc., and that this action is predicated upon that provision of said section which was incorporated into the constitution of 1890 for the first time. In the case of the *City of Jackson v. Williams et al*, reported in 46 So. 551, this court construing this provision of our fundamental law, used the significant expression: "Nothing is now so important to the private citizen as the question of the extent to which his right of private property may be invaded by a municipality and taken and damaged, etc."

This court again in the case of *Sturges v. The City of Meridian*, 48 So. 620, in a comprehensive opinion delivered by Justice FLETCHER, in my judgment, decides the proposition without any equivocation, and in diametrical opposition to the action of the learned circuit judge who gave the peremptory instruction in this case.

Once again this court speaking through Special Justice CAMPBELL, in the case of *King v. Vicksburg Railway and Light Company* in 42 So. 704, and in construing section 17 of our constitution says: "Due compensation is what

ought to be made, i. e., what will make the owner whole pecuniarily for appropriating or injuring his property by any invasion of it cognizable by the senses, or by interference with some right in relation to property whereby its market value is lessened as the direct result of public use. This language is found in the opinion of the court at page 205 of said volume. On the same, Justice CAMPBELL says: "The Constitution, paragraph 17, makes the right of the owner of private property superior to that of the public, reversing the former rule that the individual might be made to suffer loss for the public."

We think also that the case of *Thompson v. City of Winona*, 51 So. 129, absolutely and without question is decisive of the question here presented.

It has been, we think, universally decided by this court that a drainage district is a *quasi*-municipal unit or subdivision, of the state, then, if this conclusion be true how can this case be affirmed in the light of the opinion rendered in *Brahan v. Meridian Home Telephone Company*, 52 So. 485, in an announcement of the law relating to such conditions. This opinion was handed down by the late Chief Justice MAYES, in which it was announced, that a municipality could not delegate authority to any one to injure or damage private property.

It will also be observed from the record, that even though Banks, a former owner of the land in question actually signed a petition to the commissioners requesting that the canal in question be widened and deepened, still this action upon his part, if true, was not shown by the testimony to have been brought to the attention of appellant, nor was same shown to have been placed on record prior to the time that appellant purchased the land in question. In the case of *Robinson v. Mayor and Aldermen of the City of Vicksburg*, 54 So. 859, Justice ANDERSON, in his opinion therein, says: "Private property shall not be taken or damaged for public use except on due compensation being first made to the owner thereof, etc." The petition signed by the appellant contained no expressed

waiver. May a waiver be implied from a mere signing of the petition by him? Or may a waiver be implied by his signing the petition with the knowledge that in paving the street the city might find it necessary to change its grade? We think not. In our judgment such conduct ought not to operate as an estoppel. A constitutional right may not be so lightly waived.

The court will please bear in mind that we are not seeking to recover from the treasurer of the lower Coonewar drainage district, but this suit was brought against a corporation, The Swamp Dredging Company and D. W. Robins. In connection with this phase of the case we respectfully refer the court to the case of *Mississippi Central Railroad Company v. Holden*, 54 So. 851.

As bearing directly on the question presented we also refer the court to the opinion of Justice CALHOON in the case of *Yazoo & Mississippi Valley Railroad Company v. Lefoldt*, 39 So. 459, and the authorities cited in that opinion.

The testimony of appellant and his witnesses show, that he suffered a loss of thirty-five acres of the very finest alfalfa, on land that was in a very high state of cultivation; that this was a complete loss, and that it was occasioned by appellees in the work undertaken by them. Not only this, but that he also suffered a loss of fourteen acres of corn which also according to his testimony, was completely destroyed. Now in view of the above authorities what right (I do not speak of power) had the trial court to refuse the submission of this case to a jury?

I am perfectly familiar with the recent case of *Stephens v. Beaver Dam Drainage District*, which opinion was delivered by Chief Justice SMITH on January 3, 1921, and reported in 86 So. 641, which, in my judgment, has no application whatsoever to the allegations contained in the declaration in this case, and the facts as disclosed by the testimony of the witnesses. Chief Justice SMITH in paragraph two of his opinion decides, in my judgment, the identical proposition presented here. It is held in this

case that a public corporation created *in invitum* cannot be held responsible for the act of negligence either of its officers, agents, or employees. The court will again bear in mind that we are not seeking to recover from the drainage district. If appellees in performing their contract had used therein a sufficient amount of dynamite to have blown appellant's entire farm clear over the smoke stacks, of eternity, could it be held in the light of the above opinion of this honorable court that there would be no liability?

We respectfully submit that this case should be reversed and submitted to a jury under proper instructions.

*Robins & Thomas*, for appellee.

The appellant's learned counsel bases his case, in his brief to this court on section 17 of the constitution of Mississippi, that private property cannot be taken or damaged for public use, except on due compensation being made to the owner.

He seems to have the idea, because of this constitutional provision, that any and all damage to private property is protected, no matter when or how it occurs. He loses sight entirely of the doctrine expressed in the legal maxim "*damnum absque injuria*."

This principle, which lies at the threshold of the consideration of this case, is thus expressed: "To constitute an injury, there must be a violation of some legal right, and there are many cases in which a person may sustain actual damage, without sustaining any legal injury." In such cases the damage is *damnum absque injuria*—damage without injury—and no cause of action arises in favor of the party sustaining it against the party by whose act it was caused. 1st Corpus Juris, title, "Actions," page 964.

"No cause of action arises from the doing of a lawful act or the exercise of a legal right, if done or exercised in a lawful or proper manner, the resulting damage, if any, being *damnum absque injuria*. A liability may, however, arise from the doing of a lawful act, or the exercise of a

legal right in a negligent or improper manner, but in such cases the liability is based, not upon the act done, but upon the manner of doing it." *Corpus Juris*, 965.

Everyone has a right to the natural use and enjoyment of his own property, and for lawful acts done by one person upon his own property, in a lawful and proper manner, there is no cause of action, although damage to another may incidentally result therefrom, such damage being *damnum absque injuria*. *Corpus Juris*, page 966.

The distinction between injury and damage is well defined by the supreme court of Connecticut in the case of *Parker v. Griswold*, 42 Am. Dec., 746. An injury, legally speaking, consists of a wrong done to a person, or in other words, a violation of his right. It is an ancient maxim that a damage to one, without an injury in this sense (*damnum absque injuria*) does not lay the foundation of an action; but if the act complained of does not violate any of his legal rights, it is obvious that he has no cause to complain . . . An injury is a wrong; and for the redress of every wrong there is a remedy; a wrong is a violation of one's right and for the vindication of every right there is a remedy.

"The exercise by one of a legal right cannot be a legal wrong to another." *Haywood v. Tilson*, 46 Am. R. 373. To state the point in a few words, whatever one has a right to do, another would not have the right to complain of. *Cooley on Torts*, 830.

"To constitute a tort, the wrong must have amounted to a breach of a legal duty owing by the wrongdoer to the injured party, which duty may exist either independent of or be created by statute. That a mere moral duty has been disregarded or moral right violated and damage suffered in consequence thereof, is not sufficient to give rise to an action for tort, where no legal right of plaintiff has been infringed. Such cases the law classified as *damnum absque injuria*."

The above quotation is from 37 Cyc. page 418, and the quotation is followed by quite a number of instances of the application of the doctrine.

"In the absence of a statute or of an easement acquired, no legal right is infringed where the owner of real property is deprived of right, air, or view, or the support of artificial burdens placed upon his land, by the act of an adjoining owner in erecting and maintaining a fence, building or other structure on his own land, or in excavating on the same with due skill and care to avoid injury . . . and it is the established rule that when a lawful act is performed in a proper manner the party performing it is not liable for mere incidental consequences injuriously resulting from it to another." 38 Cyc. 421.

The owner of property, who digs a mine or well on his property, is not liable if he interrupts the flow of percolating subterranean waters, to his neighbors' 'damage *Ocean Grove, Camp Meeting Association v. Asberry Park*, 40 N. J. Eq. 447.

There is a good statement of this doctrine in *West Virginia v. Standard Oil Company*, 88 Am. S. Rep., at page 898. "The plaintiff must have a right and that right must be injured by the defendants, and injured, too, by unlawful means, by acts which the defendants had no right to do. Plaintiff must establish that defendants owed a duty to the plaintiff, and broke that duty, to make an actionable tort. There can be no tort, unless there is a duty from one to another, and that duty broken. You may set this down as a test of tort: 'A legal right must be invaded in order that an action of tort may be maintained. The mere fact that the plaintiff may have suffered damage of the kind which the law recognizes is not enough. There must also be a violation of a duty recognized by law. In the language of the civil law mere *damnum* is not enough. There must also be *injuria*; that is, *ex damno absque injuria non oritur actio*. We must nicely distinguish between *damnum* and *injuria*. We commonly use the words injury and damage indiscriminately, but in the rule above these Latin

words are distinct. *Damnum* means only harm, hurt, loss, damage; while *injuria* comes from in which means against, and *jus*, which means right, and the two means something done against the right of a party, producing damage, and has no reference to the effect or amount of damage. Unless a right is violated though there be damage, it is *damnum absque injuria*.' "

The court will bear in mind, in the consideration of this principle, that the drainage district had a grant of a right of way for its drainage ditch, through the lands owned by the appellant, Moore. The right of way crossing plaintiff's land, was obtained, in the first instance, by grant. Agreed Statement of Facts, transcript, page 16. This grant was made for the purpose of constructing a drainage canal, and the court below was absolutely right and justified, under the authorities, in holding that this right of way and grant carried with it the right to construct, in the usual and ordinary way, with reasonable skill and diligence, the canal through his land, with a dredge boat. In fact, the testimony shows that the dredge boat was in operation at the time plaintiff bought his land, on the same canal, but not on his land. The work was started in October or November, 1918, and the appellant acquired his interest in the land in January, 1919. See transcript page 70.

We have no case directly in point as to what is included in a grant to a drainage district from this state, but our court has decided what is included in a right of way grant to a railroad company. In *Canton v. Cotton Warehouse Company*, 84 Miss. 291. The supreme court of Mississippi says: "The question next arises as to what right a railroad company acquires in its right of way, and further, whether there is any difference in the extent of these rights, where the right of way is over private property, or where it traverses public streets or highways. It should be borne in mind that both railroad corporations and municipal corporations are created solely by legislative authority, and are clothed in this connection at least, only with such

powers as are expressly granted in the creative act, which vitalizes and brings them into existence. By the grant to a railroad of a right of way, whether that grant be made by legislative act over public or across public highways, or by condemnation proceedings, donation, or purchase, through private property, certain rights in the use of its right-of-way are acquired by the railroad. It has the right to do all things with its right of way, within the scope of its charter powers which may be found essential or incidental to its full and complete use for the purpose for which it was acquired. Thus it has been held that a railroad cannot be successfully constructed, or advantageously operated, without establishing proper grades, so that trains may be safely and speedily transported over its tracks. The abutting owner has no claim for compensation for any earth that may be removed for the right of way, or for damages by establishing in a proper manner a grade thereon.

We call attention to the fact that in this opinion, rendered by Judge TRULY, the acquisition of the right of way confers all essential and incidental authorities to use it for the full and complete purpose for which it was acquired. One of the questions decided in this case was that the railroad company, by virtue of its right of way grant to it, to cross a public road or way, has the right to cross a street, and that it has, as an incidental right, the right to construct conduits across streets and across its right of way, and that the construction of said conduits would necessarily temporarily and partially obstruct the street, and that this was a damage and not an injury. *N. O. B. R. Railroad Company v. Brown*, 64 Miss. 482; *A. & V. Railroad Company v. Stingily*, 111 Miss. 239; *Railroad Company v. Brown*, 64 Miss. —; *A. & V. Railroad v. Stingily*, 111 Miss. 239.

When Mr. Moore's grantor, through whom he claims, made a grant of this right of way to the drainage district through this land, it included the right, of course, to construct the canal in the usual and reasonable way, and the

grant supposed compensation for all incidental and consequential damages that might result from a proper construction of the canal.

We think the case of *Stephens v. Beaver Dam Drainage District*, in this court, reported in 86 So. page 641, to the effect that a drainage district, organized under chapter 269 of the Laws of 1914, (and this would apply equally to the present drainage district) is an involuntary public corporation and as such, is not liable for the unauthorized acts of its officers, agents, or employees, but in effect this case decides that the acquisition of the right of way includes compensation for all damages resulting from the non negligent construction of the canal.

We stated in a former part of this brief that we had not found a decision of our court directly in point, to the effect that a grant of a right of way to construct a canal would be conclusively presumed to have covered incidental and consequent damages growing out of the proper construction of it, but the analogy between the grant of a right of way to a railroad company, and especially where it is expressed as in the *Stingily* case, is so complete that we take it that that is an authority for the present case.

However, we found a decision of the supreme court of Arkansas in *Daniels v. St. Francis Levee District*, in 84 Ark. 333, that is directly in point, to the effect that the grant of a right of way to construct a levee over the land of another precludes him from recovering from the district any damages resulting from floods due to the proper construction of the levee. We confidently submit the case to the court.

. SYKES, P. J., delivered the opinion of the court.

The appellant, C. B. Moore, as plaintiff, filed in the circuit court suit for damages for the value of thirty-five acres of alfalfa and fourteen acres of corn alleged to have been drowned and killed by water caused by the damming up of the Coonewar canal by the defendant. The declara-

tion alleges the organization of the Coonewar drainage district several years prior to the alleged injury; that this district was organized and operated under the provisions of chapter 39 of the Code of 1906 (chapter 99, Hemingway's Code); that the commissioners of this drainage district, acting in their official capacity, entered into a contract with the defendant to clean out and deepen and widen the canal, which runs through the land of plaintiff; that in accordance with this contract the defendant in the performance of it dammed up the canal, and placed its dredgeboat in it for the purpose of performing the work, by virtue of which the canal was flooded with water and completely stopped as a running stream, causing it to overflow and break through its banks and pond the water upon the alfalfa and corn lands of the defendant and hold it there for a sufficient length of time to kill and drown out these crops.

The defendant filed a plea of the general issue and a special plea in which it averred, among other things, its nonliability because of the legal organization and maintenance of the drainage district and the agreement of the landowners in this district to the doing of this work, among which landowners was the immediate predecessor in title of plaintiff, and the plaintiff bought his land after the district was organized and while this work was being done by the defendant, and that the work was done in a proper, skillful, and workmanlike manner, in the method and according to the plans under which the defendant contracted to do it, and without any negligence on the part of the defendant; that any damage done to the crops of the plaintiff was an incident to the construction of the work. There were other pleas filed not necessary to be noticed in the case.

Upon motion, the plaintiff was allowed to amend his declaration and allege that the defendant was guilty of negligence in the performance of his contract, and that it was not performed in accordance with law, and was in

violation of section 17 of the Constitution of the state of Mississippi.

There appears in the record an agreement to the effect: That the Coonewar drainage district was organized several years ago, under proper proceedings before the board of supervisors. Subsequent thereto proceedings were had in the chancery court under chapter 39, Code of 1906 (chapter 99, Hemingway's Code). That the orders and decrees under this chapter, and under which this contract was let, were proper and valid and in strict conformity with the law. That the commissioners were properly appointed, the district properly organized, the proper orders obtained for the enlarging of the canal, and that the canal crossed the land of the plaintiff, over which a right of way was obtained in the first instance by grant. That the work which was being done on this canal, about which this controversy arises, was being done by virtue of an order of the chancery court. It is not contended that the plan adopted for the enlarging of this canal was an improper plan.

The circuit judge held that the only issuable fact presented by the pleadings and this agreement was whether or not the defendant was guilty of negligence in the performance of the work in enlarging this canal, and, if so, whether or not this negligence was the proximate cause of the alleged damage to plaintiff. At the conclusion of the introduction of the testimony a peremptory instruction was given in favor of the defendant, upon which judgment was entered.

In this court it is the contention of the appellant: First, that he is entitled to recover in this case regardless of any negligence of the defendant under section 17 of the Constitution, which provides that "private property shall not be taken or damaged for public use, except on due compensation being first made to the owner," etc.; second, that the testimony in the case shows that the defendant contractor was guilty of negligence in the building of a dam in the canal on the plaintiff's land and in failing to provide

an adequate ditch or outlet for the water from a point above the dam, and running into the canal below the dam.

Without setting forth in detail all of the testimony in the case, it is sufficient to say that the uncontradicted testimony shows that the contractor did this work in accordance with the plans for the enlarging of the canal; that the putting in of the dams across the canal was the usual, proper and necessary way in which this work had to be done; that the outlet, or, as it is called in the record, spillway, which is a small ditch leading out of the canal just above the dam and into the canal again below the dam, and which is meant to take care of some of the surplus and overflow water of the canal, was in this case built in the usual, proper, and ordinary manner. In fact we find no question of negligence in this record which should have been submitted to the jury.

The agreed statement of facts shows that the Coonewar drainage district acquired its right of way in this case by grant for canal and drainage purposes; that it was necessary and proper for this enlargement work to be performed. By this grant the drainage district necessarily became vested with the right and power to do whatever work was necessary and proper upon the canal for its proper use and maintenance, and included in this grant was the right to properly construct the canal in the first instance, and the further right to properly maintain it in the future, doing whatever work became necessary to maintain it as a proper canal to drain the lands within the district, which grant necessarily carried with it the right to clean out, enlarge, or do whatever other work was necessary and proper for its maintenance and use.

In the case of *Canton v. Cotton Warehouse Co.*, 84 Miss. 268, 36 So. 266, 65 L. R. A. 561, 105 Am. St. Rep. 428, in discussing for what purpose a railroad could use its right of way this court said:

"It has the right to do all things with its right of way, within the scope of its charter powers, which may be found essential or incidental to its full and complete use for the purpose for which it was acquired."

In the case of *Railroad v. Brown*, 64 Miss. 479, 1 So. 637, in speaking of a landowner over whose land the railroad company had acquired a right of way by condemnation proceedings, it is held that:

"The plaintiff (the landowner) is not entitled to recover anything from the defendant for doing what it had the right to do, no matter why it may have done it. . . . Mr. Brown is not entitled to damages because of the unsightliness of his plantation, or its supposed unhealthiness from standing water, or the inconvenience of crossing over by reason of the pits made in the excavations on the right of way. He must suffer uncomplainingly the natural result of the proper exercise by the railroad company of its right, as purchaser and owner of the right of way over his land, to make such use of it as it saw proper under its charter and within its provisions. For all this he is supposed to have been paid in the proceedings by which his land was condemned for the right of way. He was entitled to this, and it must be assumed that he got all he was entitled to."

Again in the case of *Railroad Co. v. Stingily*, 111 Miss. 237, 71 So. 376, this rule is therein reannounced as follows:

"As we understand the trend of the decisions of this court, it has always been held that when a right of way for a railroad company is condemned or bought, the right to do any and all things necessary and proper in the use of same are presumed to have been paid for. The land owner is supposed to have been compensated for all damages incidental to a proper use of the land. He, of course, must have taken into consideration all of the injuries which might flow from the proper operation of a railroad over his land, and demanded and received compensation for the land taken, not as a separate tract, but as a part of the entire tract. He could and should have received compensation for damages to the whole tract which would follow from a maintenance of the right of way."

In the case of *Daniels v. Board of Directors of St. Francis Levee District*, 84 Ark 333, 105 S. W. 578, this rule is thus correctly stated by the supreme court of that state:

"Plaintiff having expressly consented to the construction and maintenance of the levee and granted a right of way over his land for that purpose, he cannot complain of any damage to the land resulting from the construction of the levee in a skillful manner. His grant to the levee district of the right to construct the levee through his land was a waiver of any claim for damages to the land resulting from the construction and maintenance thereof, if done in a skillful manner. Such damages are conclusively presumed to have been compensated for by the consideration paid for the conveyance."

In this case, since the drainage district is not liable for this damage, then the contractor necessarily cannot be held liable for the doing of the work in a proper manner.

In principle there is no difference between the use of a railroad right of way and the use of a drainage canal. The landowner in each instance is presumed to have been compensated for all damages to his land which results from a proper use of the right of way for the purpose for which the land was granted.

In this case, assuming that the damage to the crops was caused by the manner in which the work of enlarging the canal was being done, the testimony shows that the work was being properly performed, and that the drainage commissioners had a right to have this work done. Consequently, there was no invasion or violation of any legal right of the plaintiff, though his damage was caused by the doing of this work. This is *damnum absque injuria*.

"No cause of action arises from the doing of a lawful act or the exercise of a legal act if done or exercised in a lawful and proper manner; the resulting damage, if any, being *damnum absque injuria*." Corpus Juris, vol. 1, p. 965.

"Everyone has a right to the natural use and enjoyment of his own property, and for lawful acts done by one person upon his own property in a lawful and proper manner

there is no cause of action, although damage to another may incidently result therefrom, such damage being *damnum absque injuria*."

This rule is well settled in the case of *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739:

"An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim that a damage to one, without an injury in this sense (*damnum absque injuria*) does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious that he has no cause to complain."

Again in *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, quoting Cooley on Torts 685:

"The exercise by one man of a legal right cannot be a legal wrong to another."

(4, 5) In the adoption of the plans and in the doing of the work the maxim, "*Sic utere tuo ut alienum non lædas*" as construed by the court, must be observed. This rule is thus laid down in *Sinai v. Railway Co.*, 71 Miss. 547, 553, 14 So. 87, 88:

"But, in the use and exercise of its privileges and powers, we must not assume that the state designed to disturb well-settled, general legal principles, and to absolve its creation from the observance of the same rules of conduct as apply to and govern the natural person. The railway corporation must not recklessly and willfully use its powers to the injury of the citizen. It must use its privileges in such manner as may be necessary to meet the objects of its creation; but it must do so with reasonable care and skill. It may, by proper expropriation proceedings, take private property for its public use, but it must first make compensation to the owner despoiled, and the owner, as well as any other citizens affected by its construction, has a right to insist that future evils, foreseen as likely to follow a particular method of exercising the powers granted the railway corporation, shall be guarded

against, if the same can be conveniently and reasonably done, regard being had to the interests of the corporation as of the individual citizen.

"If in the execution of chartered rights it shall become necessary to do a particular act in a particular manner, it may safely do so, though evil may result to others; but if the same act may as well be done for the railway's interests in another way, and without hurt to others, reason and justice will require the adoption of the nonhurtful method of executing its powers. The execution of its rights in a particular method foreseen to be fraught with peril and injury to others, when another method, equally safe, convenient, and useful, is rejected, will subject the corporation to the imputation of willful negligence.

"With railway corporations as with natural persons employed in the same or like work, it must be true that unnecessary and wanton injury may not be done one by another in the use and enjoyment of his proprietary rights. The rule possesses flexibility and adaptability to all conditions likely to arise is that which guards the right of the landowner to deal with his own as he will, qualified by the duty imposed upon him to so use his own as not to hurt his neighbor, if that be reasonably within his power."

To the same effect is *Holman v. Richardson*, 115 Miss. 169, 76 So. 136, L. R. A. 1917F, 942.

In this case there is no contention, either in the pleadings nor shown by the testimony, that any other plans could have been adopted or the work done in any way save the plan adopted and the manner in which it was executed.

The learned circuit judge was correct in granting the peremptory instruction for the defendant.

*Affirmed.*

DAVIS, FEDERAL AGENT, *et al.* v. HAMBRICK, *et al.*

[88 South. 511, No. 21829.]

WATERS AND WATER COURSES. *Evidence held insufficient to sustain judgment against railroad company for flooding lands by filling in trestle.*

In a suit against a railroad company for damages to growing crops caused by filling in a portion of a trestle over a stream and thereby obstructing the flow of the flood waters of the stream, so as to cause the waters to be impounded on the lands of plaintiff to an increased depth, and to remain on the land longer than they would if the trestle had not been filled, where the undisputed testimony shows that there was an excessive rainfall and several extraordinary overflows, which flooded the entire valley of the stream, both above and below the railroad embankment, a judgment for plaintiff will be reversed, where there is no testimony which would enable the jury to separate the damages attributable to the wrongful act of the railroad company from that caused by the excessive rains on the crops and the consequent flooding of the land independent of the trestle.

APPEAL from circuit of Lee county.

HON. C. P. LONG, Judge.

Separate actions by A. C. Hambrick and Will Perry and by said Hambrick and Sam Westmoreland against James C. Davis, Federal Agent, and the Mobile & Ohio Railroad Company. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

*J. M. Boone and W. D. Anderson, for appellants.*

*Rankin & Finley, for appellees.*

No brief found in the record for either side.

WILLIAM H. COOK, J., delivered the opinion of the court.

A. C. Hambrick was the owner of certain lands situated in Town Creek valley, in Lee county, and the track of the Mobile & Ohio Railroad crosses this valley. The railroad track runs north and south, and at the place where it crosses Town Creek there was formerly a trestle about three hundred feet long; but in May, 1919, the railroad company filled in more than two hundred feet of this trestle. During the year 1919 Will Perry and Sam Westmoreland were tenants on Hambrick's land, and each cultivated about twelve acres of the land which was west of the railroad track. Hambrick and Perry instituted a suit for damages against the Mobile & Ohio Railroad Company and the Director General of Railroads, averring that there was a natural drainage of the land west of the railroad towards the southeast and under this trestle over the channel of Town creek, and that on account of the filling in of this trestle the natural flow of the waters under the trestle was so obstructed as to cause the water to be impounded upon the lands of plaintiffs, and as a consequence the crops growing on the land were injured and destroyed. Hambrick and Sam Westmoreland also filed a similar suit for damages done to the crops being grown by Westmoreland, and the two suits were, by agreement, tried before the same jury, with instructions to the jury to return separate verdicts in each case; the testimony in each case being the same. There was a verdict for plaintiffs for five hundred and forty-seven dollars in each case, and by appeal the two cases are before this court upon the same record.

It appears from the testimony of all the witnesses that, during the fall of 1919, at which time it is alleged that plaintiffs' crops were damaged, there was an excessive rainfall, and several unusual, if not unprecedented, overflows and that the entire Town Creek valley, both east and west of the railroad, was overflowed to a considerable depth at the time of these several floods. It appears from the undisputed testimony that plaintiffs'

land in this valley would have been submerged by these several overflows if the trestle had not been partially filled, but it is contended, and there is testimony to the effect, that on account of the partial filling of this trestle the depth of the water on the west side of the railroad was increased, and the water was caused to stand on the land longer than it would if the trestle had not been so filled, and that as a consequence there was damage to the crops which was attributable directly to this act of appellant railroad company.

Under this testimony we think it was proper to submit to the jury the question of the amount of damages, if any, properly attributable to the act of appellant in partially closing the opening under the railroad track, and the instructions granted defendant properly limited the right of recovery to this damage. However, the testimony offered by appellees wholly failed to furnish any basis which would enable the jury to separate the damage caused directly by filling the trestle from that caused by the excessive rains during the harvesting period, and the consequent flooding of the land independent of the trestle. Upon the question of damages appellees offered evidence showing the amount of cotton and corn which was estimated to be growing on the land when the rains started, and also proved the market value of such products. No effort was made to prove the value of the unharvested crops, or the amount of damage attributable to the negligent act of appellants; but this was left entirely to speculation. For this reason, the judgment in each case is reversed, and the cause remanded.

*Reversed and remanded.*

MEXICAN GULF LAND CO. v. GLOBE TRUST CO. *et al.*

[88 South. 512, No. 21607.]

1. CORPORATIONS. *Corporate deed executed by secretary to himself, as grantee not void, where president also joined.*  
The fact that a deed from a corporation to an individual to land was executed on the part of the corporation by its secretary, who was also grantee in the deed, does not render the conveyance void, where the president of the corporation also joined in the execution of the deed, under section 2766, Code of 1906 (section 2270, Hemingway's Code), which provides, among other things, that a corporation may convey its land under the corporate seal and the signature of an officer.
2. ACKNOWLEDGMENT. *Corporation's deed need not be acknowledged nor filed for record as between parties.*  
A conveyance of land by a corporation, in order to be valid as between the parties thereto, is not required to be acknowledged by the officer executing the same for the corporation, nor filed for record; such a deed being valid without being so acknowledged and filed for record; acknowledgment and recording being required for the purpose alone of constructive notice to others subsequently dealing with the land conveyed.
3. CANCELLATION OF INSTRUMENTS. *Petition held insufficient to state grounds for cancellation of corporation's deed to its secretary.*  
A bill in equity by the grantor in a deed against the grantee to set aside and cancel such deed as a cloud upon the grantor's title, the grantor being a corporation, which alleges as grounds for cancellation of such deed that the consideration therein mentioned is "feigned and fictitious;" that the grantee in the deed was the secretary of the grantor corporation, and joined in the execution of the deed to himself, together with the president of the corporation; that the deed was not legally acknowledged by the president of the corporation—states no grounds for cancellation of such deed.

APPEAL from chancery court of Harrison county.

HON. W. M. DENNY, Jr., Chancellor.

Suit by the Mexican Gulf Land Company against the Globe Trust Company and others. Decree for defendants, and plaintiff appeals. Affirmed and remanded.

*White & Ford*, for appellant.

Section 2799, Code 1906, provides mandatorily that in an acknowledgment to a deed the state and county must be stated. Some states have no such statutes; some have them and provide that the directions therein contained are directory merely; some states hold the act of the officer in taking the acknowledgment acts, judicially, others ministerially, and Mississippi, through many decisions of this court, holds such an act is judicial. The authorities are uniform that where the act is judicial the jurisdictional facts must appear and the authorities are uniform that where the statute provides how the acknowledgment shall be performed, the courts of the state hold such an act is judicial in its nature, that failure to comply with the statute renders the attempted acknowledgment a nullity.

So, bearing in mind that this court has held in the case cited in original brief and in *Tinnin v. Brown*, 98 Miss. 378, that where the acknowledgment of a deed is fatally defective, it is not entitled to record and is not constructive notice to subsequent purchasers, we will cite authority to maintain our position.

In this case there was no substantial compliance with the statute. We desire to say that there are cases decided in states where taking an acknowledgment was not held to be judicial and where the statute was only directory and so held to be by the courts of such states, holding that a substantial compliance was sufficient. But in this case we submit there was no sort of compliance. In every case where the statute is mandatory, the courts hold the statute must be complied with.

If wanting, (the acknowledgment) it cannot be supplied; if defective, it cannot be amended; and, if properly authenticated, it cannot be gainsaid nor questioned, except for fraud . . . (citing three Mississippi cases) the officer who takes it performs a judicial act in determining whether it was acknowledged in the mode and manner required by law; and he is required by his certificate to authenti-

cate the judicial conclusion to which he has arrived, etc. *Harmon v. Magee*, 57 Miss. 415.

The officer who takes an acknowledgment acts in a judicial character his act is an official record. *Wasson v. Conner*, 54 Miss. 351.

Vol. 1, *Corpus Juris*, page 810, discusses the question citing authorities on the question of whether taking an acknowledgment is a judicial or ministerial act, and it puts Mississippi in the first class along with many other states with very able courts, and cites the two cases last above referred to. In the case at bar the instrument fails to recite the necessary jurisdictional facts and in this state, the certificate cannot be enlarged by averment. *Willis v. Gattman*, 53 Miss. 721.

It will be noted by the court that the deed in this case has no caption at all, neither at the head or beginning of the instrument, or before the acknowledgment.

As an illustration of the trend of the law, in states where there are no statutory provisions such as Section 2799, Code 1906, or where, having such provisions, the same are directory, the rule is laid down that: "In order to be regular, a certificate of acknowledgement should in some way show either of itself, or when read in connection with the instrument acknowledged, the state and county where the acknowledgment was taken," and: "Where the venue is not required to be stated by the statute prescribing the form of acknowledgment of certain instruments, an erroneous recital of venue may be disregarded as surplusage." 1. *Corpus Juris*, p. 829-30.

Every acknowledgment of a deed should show on its face that it was taken within the jurisdiction of the officer certifying it. *Leavitt v. Thornton*, 108 N. Y. Supp. 162.

The words "United States of America" is too indefinite as a venue. *Montag v. Linn*, 19, Ill. 399. A very good case we now refer to the court; in the case of *Hardin v. Kirk* 95 Am. Dec. (Ill) at page 582. In the *Hardin* case the county was given. In this case nothing is given anywhere, even in the caption of the deed proper.

A tax deed not acknowledged in the manner required by statute is void upon its face. *Matthews v. Blake*, 27 L. R. A. (N. S.) 399 (Wyoming). This court, in discussing failure to comply with statutory requirements as to acknowledgments adopts the clearest and most persuasive reasoning we have found. The logic is unanswerable. We quote: "This is the mode in which the statute says the contract shall be concluded, and to say that the statute should not be followed, would be equivalent to saying that its provisions might be wholly disregarded. It is not a choice between a statutory and a common-law mode of proceeding but it is either to follow the statute, or act without any rule of law at all on the subject." *Dalton v. Murphy*, 30, Miss. 59.

Could anything be clearer or founded on better reason? If one provision of the statute can be disregarded, then why cannot the whole provision even to dispensing with any acknowledgment at all? Where the statute requires an instrument to be acknowledged or proved, before it is entitled to resignation, the record of an instrument, which appears on its face to have been defectively acknowledged or proved, will not import constructive notice to subsequent purchasers in good faith. 1 C. J. 772, *Citing Emslie v. Thurman*, 87 Miss. 537; *Wasson v. Conner*, 54 Miss. 351; *Tillman v. Coward*, 19 Miss. 262, 12 S. & M. 262; *Emerio v. Alvarado*, 27 Pac. (Cal.) p. 362.

We submit therefore it cannot be disputed that in this state a deed cannot be admitted to record until acknowledged as required by statute. The acknowledgment is the most material part of the transaction. It is its culmination. The act is a nullity until it is done, and then to say it can be half way done would be absurd. To make such a rule would abrogate the statute to each individual his own method of making an acknowledgment. A defective acknowledgment as we have seen, is no acknowledgment at all. This doctrine is peculiarly applicable to this state and is so well established as to make assault a vain undertaking.

*Leathers & Moore*, for appellee.

We direct the court's attention here to the fact that there is no allegation or charge of fraud in this bill of complaint whatever; that this paragraph of the bill of complaint which appears to be the gist of the appellant's case as set out in its bill, does not charge any fraud of any sort or any sort of collusion or unfairness on the part of the Secretary, Leland J. Henderson, in purchasing the said land. It does not appear that the complainant corporation was overreached or defrauded or in any manner treated unfairly with reference to said transaction, but simply sets out the naked, unsupported assertion that the President of the said company did not acknowledge said deed to Leland J. Henderson, as required by the laws of the state of Mississippi.

With reference to the deed itself, filed as an Exhibit to the bill of complaint, it appears that this allegation of the bill is inconsistent with the allegations of the exhibit to the said bill, to-wit: The deed, because the deed and the acknowledgment thereto of the president of the corporation, shows on its face, that the president did acknowledge the deed, as president of the corporation in conformity to the laws of the state of Mississippi. Therefore, this allegation in the bill can be of no effect and can have no force whatever in this condition as a pleading. The deed and the acknowledgments to it by the president and the secretary also, for that matter, are regular on its face; it contains all of the legal requirements provided by the laws of this state for the execution of a deed and a good and valid deed of this character, and a simple assertion in the bill of complaint to the contrary, in the face of the recitals in the deed and its apparent regularity, a copy of the deed being filed as an Exhibit to the said bill, amounts to nothing and are therefore insufficient allegations and averments, and show no sufficient cause of action. In other words, the ground of the demurrer, that there is no equity on the face of the bill, is fully sustained by reason of the foregoing facts appearing on the face of this bill of complaint.

In addition to this, the deed being regular on its face, and there being in the bill of complaint no allegation of fraud as to the appellees or any of them, and no allegation of unfair conduct in the purchase of the said land by Leland J. Henderson, the Secretary, under a well known principle of law the appellant company is now estopped by this deed, valid and regular on its face, from setting up any claim to this land, and from denying the appellees, Wesley Williams and his wife, the present owners, are the real, legal and equitable owners of the said land. This is true where the deed is regular on its face, is legal and valid, and there is no allegation of fraud or unfairness in the bill of complaint as to the execution and delivery of it; and there is none in this case.

We therefore submit that for this reason, if no other, this pretended suit is at an end and in view of the allegations of this bill of complaint, and that the demurrer was properly sustained by the trial court.

Counsel for appellant in its brief has cited four Mississippi cases, which we have read, and which we submit are not even remotely in point to support appellant's contention.

In *Millsaps v. Chapmen*, 76 Miss. 842, the corporation was insolvent, and the consideration of the purchase of the property by the official of the corporation, while in this insolvent condition, was paid principally with the stock of this same insolvent corporation, but even in that case the court said that the sale was valid and it was permitted to stand, but required the purchasing official of the said corporation to pay the balance of the purchase money in cash.

The case of *Holden v. Brimage*, 72 Miss. 228, we are unable to discuss in connection with this case as it has reference to the illegality of an act of a trustee in a deed of trust, with a power of sale, who attempted to take the acknowledgment of a grantor in this deed of trust. The reason why this acknowledgment was void and of no effect are so apparent as to need no discussion, and inasmuch

as it is in no way analogous to the case now under discussion either in law, or in fact, we take it that it is unnecessary to comment further on it.

In the case of *Wasson v. Conner*, 54 Miss. 351, the same is true so far as the lack of similarity of any principal discussed in that case with the case here presented. The same dissimilarity in principal exists in the case of *Jones v. Potter*, 59 Miss. 628, cited by the appellant.

In the case of *Barker v. Jackson*, 90 Miss. 621, a chancery clerk undertook to buy lands at a tax sale in his own county, and the court held this conduct on his part was illegal, and that he acquired no title for the reason that he had to handle the records, and in fact do some of the things necessary to the very legality of the same sale under which he was undertaking to buy lands at this tax sale, and the reason and the legal principle which was applied in this case declaring the chancery clerk's purchase of these lands void, has not even the remotest application to the principles of law involved in the case under discussion and would not have any even if the deed from the appellant to Leland J. Henderson was irregular on its face, which is not true, as will appear by reference to it, and of course a naked assertion in appellant's bill of complaint to the contrary cannot overcome the fact that the deed appears regular on its face, because the deed is filed as an exhibit to the bill of complaint and is made a part of it, and is controlling as to its contents, provisions and recitals.

We desire to direct the court's attention especially in analyzing appellant's brief to the case of *Wardell v. R. R. Co.*, 103 U. S. 551, 26 Law Ed. 509, in that it supports exactly the contention appellees are making in this case, particularly with reference to the inadequateness of the allegations in appellant's bill of complaint for the purpose of entitling it to any relief, and for the further purpose of sustaining appellee's contention that the demurrer to the same should have been sustained in view of the insufficient allegations in this bill.

Having thus briefly discussed appellant's brief, we pass on to the principles of law governing this case and their application. This court has held that a corporation by its acquiescence for a long time, with knowledge of the facts, is estopped from questioning a contract made for its benefit by its president in his individual name. *Belzoni Oil Co. v. Yazoo R. R. Co.*, 94 Miss. 59, 47, So. 468. Section 2270 of the Code of Mississippi provides how corporations in this state may convey lands—and it provides in substance that a corporation may convey its lands under its seal, by a deed executed by an officer of the corporation, without specifying what officer shall execute such a deed, and in the absence of any allegation in the bill of complaint that the officer executing the deed in the particular case had no authority to execute same, it will of course, be presumed to have been executed by a proper officer having authority to do so. 10 Cyc. 780, and numerous authorities thereunder cited.

The deed from the Mexican Gulf Land Company to Leland J. Henderson, under which the appellees, Wesley Williams and his wife, now claim title, to the land in this suit, shows on its face that it was executed pursuant to a resolution of the complainant corporation. 10 Cyc., page 78, par. 9.

The general, well accepted and common sense rule of law that applies relative to the purchase of property whether real or personal, by an officer of a corporation from the corporation is as follows: That a director or any other officer may purchase property from the corporation in which he is director or officer, provided the sale is made in good faith. This general rule covers the necessary elements in order to support the validity of any sale of a corporation to one of its directors; if it is made in good faith, the sale will then be permitted to stand, and the reason of this rule is not only founded upon common sense, but it is obvious, for unless it were true it would be a hardship on corporations to undertake to do business, and in many particular instances render it almost impossible for

them to exist, and while it is true that courts are properly prone to scrutinize such transactions and to carefully look into them, unless there is some showing of fraud, unfairness or *mala fides* in such sales, they will not be disturbed. 10 Cyc., par. 16, 813, and numerous cases thereunder cited; *Webb v. Rockefeller*, 66 Kan., 166, 71 Pac. 285; *Kitchen v. St. Louis Ry. Co.*, 69 Mo. 254; *Atterson v. Lewis*, 75 Va., 720.

Where parties were estopped from claiming contract from directors as void. *Prov. Mineral & Mill Co. v. Nicholson*, 178 Fed. 36, 101 C. C. A. 157; *Cromwell v. McMillian* 177 Fed. 39, 100 C. C. A. 443; *Figge v. Bergeuthal*, 130 Wis. 615, 110 N. W. 800. In cases where corporations may avoid a contract even for fraud, they must rescind in a reasonable time depending on particular facts, otherwise the right is lost on the principle of implied ratification by action. *Childs v. Mo. Ry. Co.*, 221 Fed. 222, 136 C. C. A. 629. We find numerous authorities holding that contracts of those in a fiduciary relation to a corporation, even when void, may be validated by ratification. *Foster v. Bear Valley Co.*, 65 Fed. 846; *Stanley v. Luse*, 58 Pac. 78, and *Atterson v. Lewis*, above cited, 75 Va. 720.

Even if the sale from appellant to Leland J. Henderson was voidable as against said Henderson, it cannot now be voidable in the hands of a subsequent purchaser, Williams and his wife, as the right is lost by the delay if for no other reason, and even if the deed were irregular on its face, which is not true. *Davis v. Nueces Valley Irrigation Co.*, 103 Tex. 348, 126 S. W. 7.

Certainly the appellant, the same corporation, who sold this land to Leland J. Henderson thirteen years ago and has quietly sat by for all these years, will not be allowed to question the validity of the title of the appellees, Williams and his wife under the allegations of the bill of complaint in this case. As shown by the authorities above cited, even if there was irregularity on the face of the deed of appellant to Leland J. Henderson, appellant would not now be allowed to disturb what it might have at one

time treated as avoidable transaction, but in the present case we submit there was no voidable transaction because the sale conformed in all of its phases to the rule of law permitting a corporation to make a sale to one of its directors, where the same is in good faith, and that no fraud enters into the transaction and the court will bear in mind that none of these things are charged in this bill of complaint.

ANDERSON, J., delivered the opinion of the court.

This is a bill by the appellant, the Mexican Gulf Land Company, a Mississippi corporation, against the Globe Trust Company et al., appellees, to cancel and set aside as a cloud on its title to certain lots claimed by it in Harrison county described in the bill, the paper exhibited with the bill purporting to be its own deed to the lots in question to one of the appellees, Leland J. Henderson, made in 1909, as well as all conveyances made since that time to those claiming title or any interest in the land in question through Henderson under said deed, all of whom were made parties defendant. Appellees, defendants in the court below, demurred to the bill, which demurrer was sustained by the court, and an appeal granted to the appellant, the Mexican Gulf Land Company, to settle the principles of the cause.

The grounds relied on in the bill to set aside and cancel these conveyances are substantially as follows: That the consideration, two thousand, three hundred, sixty-two dollars and fifty cents, recited in the paper purporting to be a deed from appellant to appellee, Leland J. Henderson (on the validity of which all subsequent conveyances to those claiming thereunder are made to depend), was "feigned and fictitious," and had never been paid by the grantee. And, using the language of the bill:

"That in addition said alleged deed of January 25, 1909, is void on its face; and the attempted record or registration thereof imports nothing, and the same was never sub-

ject to recording. That the same was never acknowledged by the president of the company, the complainant, as required by the laws of the state of Mississippi, nor by any other officer thereof. That said deed pretends to be acknowledged by the secretary of said company, and, as appears therefrom, the grantee in said instrument, Leland J. Henderson, who in fact was one and the same person, and therefore incompetent to convey land to himself."

In the view taken by the court it is not necessary to go beyond the deed from appellant to appellee Leland J. Henderson, made in 1909, and the allegations of the bill touching the facts of its execution and its form and contents; for the whole case turns on the validity of this deed.

It is contended on behalf of appellant that the deed in question is void because the grantee therein, Leland J. Henderson, joined in its execution for the appellant company as its secretary; that as such secretary he occupied a relation of trust toward the stockholders of the company, and for that reason under the law he could not be both grantor and grantee in the deed.

For the purposes of this decision it may be conceded that the deed would be void if the secretary of appellant company alone had executed it for his company, but that is not the fact, because the allegations of the bill show, as does the deed itself, that the president of appellant company, Elliott Henderson, also joined in the execution of the deed on behalf of appellant company. Section 2766 Code of 1906 (section 2270, Hemingway's Code) among other things, provides that a corporation may convey its lands under the corporate seal and the signature of an officer. Therefore, eliminating the secretary; Leland J. Henderson, from the deed as grantor therein for appellant company, there is left a deed in due form executed by the appellant company through its president, Elliott Henderson. We are unable to see how the fact that the secretary occupied this dual relation in the execution of the deed rendered void the action of the president of the company in executing the deed for his company.

It is further contended on behalf of appellant that the acknowledgment of the deed by the president of appellant company is void because the certificate of the officer taking same fails to show the state and county, or venue, wherein he acted; that under the laws of this state an officer taking an acknowledgment to a conveyance acts judicially, and the venue of such an acknowledgment is jurisdictional, and, if not shown, the acknowledgment is void, and the conveyance is not entitled to be recorded, and therefore, if recorded, does not import constructive notice. For the purposes of this decision this contention may also be conceded. There is no statute in this state requiring conveyances of real estate by corporations to be acknowledged and filed for record in order to be valid between the parties. Section 2766, Code of 1906 (section 2270, Hemingway's Code), referred to above, is the only statute we have on the subject, and it simply provides as stated above, that a corporation may convey its lands under the corporate seal and the signature of an officer, and provides further that "such officer signing the same may acknowledge execution of the deed, or proof thereof may be made as in other cases." Acknowledgment and recording are not made compulsory. They are only for the purpose of registration and constructive notice. They have nothing to do with the validity of the deed as between the parties thereto. The deed as between the parties, is just as good without as with those formalities.

We therefore have a deed valid on its face, and, in the opinion of the court, taking the allegations of the bill for their full value, no ground has been shown to set it aside. There is no charge in the bill that the grantee, appellee Leland J. Henderson, practiced any fraud whatever upon the appellant in procuring the deed. It is true the bill avers that the consideration recited in the deed was "feigned and fictitious," and had never been paid. That, however, is no ground to set aside and cancel the deed. If fraud is relied on, the main facts constituting the fraud

must be set out in the pleading specifically and without equivocation; it cannot be left to mere inference.

For aught that appears in the bill to the contrary, the president of the appellant company may have been authorized and required to make the deed in question by a resolution to that effect passed by all the stockholders as well as all the directors of the company at legal meetings of each. The deed itself, which is made a part of the bill, expressly recites on its face that it was made in conformity to a resolution of the appellant company, passed at a meeting of the company, and recorded in its minutes.

*Affirmed and remanded.*

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EMPLOYERS' LIABILITY ASSUR. CORP. LIMITED, v. AMERICAN  
PACKING CO.

[88 South. 481, No. 21757.]

1. *INSURANCE. Injury to employee held not within "vessel hazard" clause of accident insurance contract.*

In an employer's accident insurance contract excluding liability for injury to employees of a packing plant received through "vessel hazard," where the employee was repairing an idle boat at plant premises and was injured by a kettle top in the plant building while on mission in connection with repairing the boat, such injury was not within the "vessel hazard" clause.

2. *INSURANCE. Employee in designated class held covered where premium determined on estimated compensation of employees.*

In an employer's accident insurance contract an employee in a designated class is covered by the policy where the premium is to be determined and paid upon basis of estimated compensation of employees.

APPEAL from circuit court of Harrison county.

HON. D. M. GRAHAM, Judge.

Action by the American Packing Company against the Employers' Liability Assurance Corporation, Limited. Judgment for plaintiff, and defendant appeals. **Affirmed.**

*Carl Marshall*, for appellant.

The court's attention is directed to the fact that the contract embodied in the policy is the law of the case, to be construed by the court as the law, and as the law of the case applied to the facts alleged in the declaration. An insurance policy stands upon exactly the same footing as other written contracts and is construed by the same rules and standards of construction. The doctrine that a policy of insurance must be construed most strongly against the insurer does not alter the rules of contract construction where the terms of the policy are plain and unambiguous in their meaning. Says Mr. Justice REED, in delivering the opinion of the supreme court of Mississippi, in *Penn Mutual Life Insurance Company v. Carrie B. Gordon*, 104 Miss. 270, 61 So. 311:

"What is a policy of insurance? It is the instrument setting forth the contract of insurance. It is the evidence of the agreement between the insurer and the insured. Its purpose is to show the considerations, the terms the contract of indemnity, the privileges, the benefits, and the conditions. The usual rules for construing contracts should be applied in considering contracts of insurance."

And, in the language of Mr. Justice SYKES, in *American Life and Accident Insurance Company v. Nirdlinger* (Miss.) 73 So. 875: "These contracts of insurance, where the terms are plain and unambiguous, are to be construed like any other contracts between parties. It is only where the terms are ambiguous or doubtful that the doubt is to be resolved in favor of the insured and against the insurer." *Mississippi Mutual Insurance Company v. Ingraham*, 34 Miss. 215; *Cooperative Life Association of Mississippi v. Leflore et al.*, 53 Miss. 1. The terms of the contract is the law of the contract. Supreme Court of Mississippi in *Williams v. Luckett*, 26 So. 697.

Hence, the court, and not the jury must construe or interpret a written contract. It is for the court to determine the law of the case which is the meaning of the terms

of the contract. *Fairley v. Fairley*, 38 Miss. 280. And the controlling purpose in construction of all contracts should be to find the intention of the parties. *Penn. Mutual Life Insurance Company v. Carrie B. Gordon*, *supra*.

The true intention of the parties must be gathered from the entire instrument, and not from isolated parts thereof. *Id.* and, there being nothing unlawful or opposed to public policy in the contract, the court must give effect to its terms as the law of the case.

A refusal of the court to give effect to them is to make a contract which the parties have not made for themselves. *Jones v. Mississippi Farms Company* (Miss.), 76 So. 880; 1 Joyce on Insurance (2 Ed.), Sec. 209. The plain language of an insurance policy must be given effect; for it is the agreed law governing the obligations of each party to the other under the contract embodied in the policy. We beg to adopt the logic of the Kentucky court of appeals holding in accord with our own supreme court, in *Spring Garden Insurance Company v. Imperial Tobacco Company of Kentucky*, 116 S. W. 234, 20 L. R. A. (N. S.) 277; *Cyracuse Malleable Iron Works v. Travelers Insurance Company*, 157 N. Y. S. 572, 94 Misc. Rep. 411.

So, we submit, the plain terms of this contract of insurance, expressed in the policy, being neither unlawful nor against public policy, is the law of the case at bar, solely governing the determination of the question whether plaintiff should recover in this action against defendant; and the question whether the allegations of the declaration taken with the exhibits thereto, are sufficient to show, when admitted to be true, the right of plaintiff to recover from defendant.

We respectfully contend that defendant's demurrer should be overruled, in that the allegations of the declaration, taken with the exhibits thereto show that plaintiff is not obligated by the policy, and the facts of the case, to indemnify or insure . . . defendant . . . against loss from the liability imposed by law in said action of Charles Breal Exhibit B and there are two clear and dis-

tinct reasons why plaintiff is not so contractually obligated, under the facts admitted by the demurrer to exist: (1) Because no accident to the said Breal, is or was within the purview and contemplation of the contract of insurance; and (2) Because Breal's compensation was never included in the estimate of compensation set forth in the schedule of warranties in the policy.

While these two reasons are inter-related, Breal's compensation not being included in the estimate of compensation upon which the premium for the policy was based and charged, because an accident to him was not covered; and, conversely, an accident to Breal was not covered by the policy because his compensation was not included in the estimate, we ask leave to take up the two points separately.

We again ask the court's attention to the familiar and well-established rule that the policy must be interpreted or construed as a whole, all clauses being read together. *Penn Mutual Life Insurance Company v. Carrie B. Gordon*, 104 Miss. 270, 61 So. 311; *Spring Garden Insurance Company v. Imperial Tobacco Company of Kentucky*, 116 S. W. 234, 20 L. R. A. (N. S.) 277.

With this doctrine of interpretation and construction before us, the matter seems easy of decision. The general insuring clause on the first page of the policy reads that, in consideration of the premium, the plaintiff agrees to indemnify defendant against loss from the liability imposed by law upon the assured (defendant) for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any employee or employees of the assured at the location described in the schedule, or the premises or ways adjacent thereto, by reason of the operation of the trade or business in the schedule, including the making of repairs and such ordinary alterations as are necessary to the care of the premises and plant and their maintenance in good condition.

What was the operation of the trade or business described in the schedule, against loss from the injury to

employees by reason of which operation of trade or business, including necessary repairs and alteration therein, defendant was indemnified? The schedule reads, in describing the trade or business the employees in which were covered:

"All operations incidental to the business of cannery. No can manufacturing and no vessel hazard."

It is clear, then, that the policy expressly excepted from the coverage and application the operation of the trade or business constituting a vessel hazard, including repairs and alterations made therein. Defendant's employees engaged to repair and alter vessels, or to perform other labor constituting a vessel hazard, are expressly reserved from coverage. Likewise, losses from accidents resulting in bodily injury to defendant's employees by reason of the operation of the trade or business of repairing or altering vessels, or to perform other work constituting vessel hazards are expressly reserved and excepted from coverage. That is the reason Breal's compensation was not included in the estimate upon which the premium was based. Why pay a premium upon him when an accident to him was not insured against?

That repairing a vessel is an employment, the risk of injury in which is a vessel hazard, is too obvious to warrant discussion. A gasoline launch is a vessel. 8 Words and Phrases, 7296, et seq; 40 Cyc. 1916.

The work being performed by Breal at the time of his injury was so closely associated with the vessel that his compensation for this very work was secured by a lien on the vessel, paramount to all other debts of defendant, and binding the vessel therefor, even though it had passed into the hands of a *bona-fide* purchaser for a valuable consideration, and without notice. Section 3085, Code of 1906; *Valverde v. Spottswood*, 77 Miss. 912, 28 So. 720.

If any meaning at all be given to the term vessel hazard, hazard incurred in the work of repairing a vessel falls within the term; and the risks of employment solely to re-

pair a boat must be a vessel hazard, or this clause of the policy is without meaning whatsoever.

And it must be borne in mind that Breal was employed by defendant for the sole purpose of repairing the vessel. He was working at what, when injured? Repairing a vessel. Why did he go near the kettle? To get an article. To what use did he desire to put this article? To further his work of repairing the vessel. Why was defendant liable to him for his injury? Because defendant negligently failed to provide him with a safe place in which to perform his work. A safe place in which to perform his work? His work of repairing the vessel. Were there any duties defendant owed Breal as his employer that defendant could breach, other than those duties incident to his employment to repair a vessel? None whatever. Did Breal have any connection with defendant's business or plant other than his employment to repair a vessel? None whatever.

The policy in this case is an employer's liability policy. The work of repairing a boat is a vessel hazard. The policy expressly excludes vessel hazard from its coverage. Breal was employed only to repair a vessel. How then can it be said that an accident to Breal, as an employee, was covered? Breal's action against defendant, based upon a relationship of master and servant, could be based only on violations of the duties that defendant owed Breal, as an employee, solely to repair a vessel. Vessel hazards being expressly excluded by the policy from coverage, how can it be seriously contended that any loss sustained in Breal's action was insured against?

Defendant's demurrer, ignoring the exclusions of vessel hazards from coverage, argues that the policy must cover the loss, because Breal's work of repairing a vessel to be used in catching shrimp to be canned was incidental, within the meaning of the policy, to the business of the cannery. This position is obviously unsound. In the first place, if repairing the vessel were an operation incidental to the business of cannery, still it is an operation expressly ex-

cluded from the coverage of the policy. In the second place, the work of repairing the vessel is too remote from the main object of defendant's plant to be considered an operation incidental thereto within a reasonable interpretation of the policy. A case in point is *Rust Lumber Company v. General Accident Fire and Life Assurance Corporation*, 134 La. 310, 64 So. 122.

In the *May Creek Logging Company v. Pacific Coast Casualty Company* (Washington), 144 Pac. L. R. A. 1915C. 155, the policy covered all operations dependent upon, or connected with, the insured's logging business. It was held not to cover loss to the insured on account of injury to an employee from the incompetence of the company's regular surgeon, although the injury for which the employee was being treated by the surgeon arose in the course of the employee's work. *Roth Tool Company v. New Amsterdam Casualty Company*, 88 C. C. A. 569, 161 Fed. 709; *Home Mixture Guano Company v. Ocean Accident and Guarantee Corporation*, 176 Fed. 600; *People's Ice Company v. Employers' Liability Assurance Corporation, Limited*, 161 Mass. 122, 36 N. E. 754; *Wollman v. Fidelity & Casualty Company*, 87 Mo. App. 677; *Kelly v. London Guarantee and Accident Company*, 97 Mo. App. 623, 71 S. W. 711. And we must again ask the court's attention to the fact that the agency means, or manner of causation of the accidental injury is not the sole criterion by which coverage is judged. It is a question of whether the injured employee was covered; and whether the injury occurred to him while working at a business insured by the policy. In the case before us for consideration, the injured employee, Breal, belonged to a class of employees who were not covered, they working upon vessels, a branch of defendant's enterprise expressly excluded from the operation of the policy, and he was performing the work of an expressly excluded operation when injured. *Maryland Casualty Company v. Little Rock Railway & Electric Company*, 92 Ark. 206, 122 S. W. 994; *United Zinc Companies v. General Accident Assurance Corporation*, 125

Mo. App. 41, 102 S. W. 605; *Kelly v. London Guarantee & Accident Company*, *supra*; *Frank Unncher Company v. Standard Life Accident Insurance Company*, 99 C. C. A. 490, 176 Fed. 16; *Tozer v. Ocean Accident and Guarantee Corporation*, 94 Minn. 478, 103 N. W. 509; *Buffalo Steel Company v. Aetna Life Insurance Company*, 106 N. Y. Sup. 977, affirmed in 156 New York App. Div. 453, 141 N. Y. Supp. 1027, holding that where the policy excluded coverage of accidents to employees below a certain age, it was immaterial that the injured employee's age bore no part in the causation of the accident, or that the accident was caused by a covered employee's negligence; since the policy (as in the case before us) expressly excluded liability for any injury to the particular employee that was injured and see *Fidelity and Casualty Company of New York v. Palmer Hotel Company*, 179 Ky. 518, 200 S. W. 923, L. R. A. 1918C. 808.

But this whole matter may be concluded by the sound statement of the law given in 14 Ruling Case Law, section 442, upon page 1266:

"Liability Insurance. Primarily it may be said that to authorize a recovery under an employer's liability policy the injured employee must have been engaged in the business insured or in some work incidental thereto."

In the case before us, Breal, the injured employee, not only was not engaged in the business insured when he received his injury, but was actually engaged in a business expressly not insured and was insured while performing the work of that business. Otherwise, he could not have brought action upon a relationship of master and servant. For to repair a vessel was all he was employed to do. Does this not conclude the question raised by defendant's demurrer? *Andrus v. Maryland Casualty Company*, 91 Minn. 358, 98 N. W. 200; *Fidelity and Casualty Company v. Phoenix Manufacturing Company*, 40 N. C. C. A. 614, 100 Fed. 604; *East Carolina Railway Company v. Maryland Casualty Company*, 145 N. C. 114, 58 S. E. 906.

Condition C. of the policy (top second page) expressly provides that: "This policy does not cover on account of injuries or death caused to any person unless his compensation is included in the estimate set forth in the schedule.

Condition C of the policy in plain, unmistakable language makes it a prerequisite, or condition of plaintiff's liability upon the policy, that the injured employee's compensation, or wages, be included in the estimate set forth in the schedule.

The declaration directly and properly pleads and alleges that the compensation, or wages, of Charles Breal, the injured person, or employee, to quote from the declaration itself: "Was not, at any time, and is not now embraced or included within the estimate set forth in the schedule forming a part of said contract and policy of insurance."

Upon this demurrer, therefore, the fact of the non-inclusion of Breal's compensation, or wages, in the estimate set forth in the schedule must be taken to exist, and be absolutely true. Accordingly, unless this valid and reasonable condition of the policy is to be written out of it, and a new contract made for the parties by the court, loss to defendant because of an injury to Charles Breal is not covered, or indemnified against by the policy.

To quote further from 14 Ruling Case Law, section 442, upon page 1266: "The fact that the wages of a laborer are included in the payroll upon which the premium for a liability policy is based may stamp him with the character of an employee within the policy, and the fact that he is so included may be made by the contract a requisite to any liability." *East Carolina Railway Company v. Maryland Casualty Company*, *supra*; *United Zinc Companies v. General Accident Assurance Corporation*, *supra*; and see *Employers' Indemnity Company v. Kelly Coal Company*, 149 Ky. 712, 149 S. W. 992, 41 L. R. A. (N. S.) 963, distinguishing the facts of a case of the type now before us from those involved in *Dives v. Fidelity and Casualty Company*, 206 Pa. 199, 55 Atl. 950.

Nor is this a case such as that of *Stevens v. Fidelity and Casualty Company*, 178 Ill. App. In the case before us there was no simple accident in failure to include in the estimate the wages of an employee otherwise within, and covered by the policy. In the instant case the compensation, or wages, of Breal was never included.

Nor is this a case such as that of *Stevens v. Fidelity and Casualty Company*, 178 Ill. App. In the case before us there was no simple accidental failure to include in the estimate the wages of an employee otherwise within, and covered by the policy. In the instant case the compensation, or wages, of Breal was never included in the estimate upon which the premium is based and it could never be included, because Breal's employment was entirely in a branch or department of defendant's business, whether incidental to the main operation or not, the employees in which were excluded from coverage by the express terms of the policy evidencing the contract of insurance. The policy never covered Breal from its inception until he left the employ of defendant. Therefore, he cannot be covered now, or at any other time. *United Zinc Companies v. General Accident Assurance Corporation*, *supra*; *London Accident and Guarantee Corporation v. Ogelsby*, 231 Pa. 186, 80 Atl. 57. And by the express terms of condition C of the policy, defendant agreed that there should be no coverage of Breal unless his compensation was included in the estimate, which was not done. *East Carolina Railway Company v. Maryland Casualty Company*. (N. C.), 58 S. E. 907. In Mississippi, as we have pointed out, the disposition of the courts is to give effect to all conditions, limitations, reservations, and stipulations in a contract of insurance, treating and interpreting it by the rules applicable to all other written agreements, and construing it as a whole. *Metropolitan Casualty Company v. Shelby*, 76 So. 839.

And so, we submit, in the case at bar, if meaning is to be given to the plain terms of the contract, if effect is to be accorded its valid conditions and exceptions, and if

no new contract is to be made for the parties by the court, plaintiff was not, and is not obligated to indemnify defendant for any loss on account of the action of Charles Breal against defendant, and the demurrer should have been overruled. For this reason we ask that the judgment appealed from be reversed and the cause remanded for proper trial upon its facts.

*White & Ford*, for appellee.

A policy of insurance is a contract and is to be construed by the rules relating to the construction of contracts generally, except that policies of insurance are construed most favorably to the insured. In determining what was the intention of the parties in making the contract, the whole instrument must be looked to rather than that any particular part should be isolated and undue importance attached thereto. Taking the contract in this case as a whole, it is clear that the insurer intended to indemnify the insured against all liability imposed by law for damages on account of bodily injuries sustained by any of its employees during the period of one year from the date of the contract, and the only hazard excluded from the contract, was vessel hazard. For this insurance, the insured agreed to pay, and did pay a premium, the amount of which was fixed at a certain rate based on the compensation paid to the employees.

We have already quoted the principal part of the contract as well as such of the conditions and warranties constituting parts thereof as are material to the determination of the issue before us. Looking to the principal part of the contract we find that the employees covered are identified by the following requirements: (1) Any employee of the insured. (2) While within or upon the premises of the insured or the premises or ways adjacent thereto. (3) By reason of the operation of the trade of business described in the schedules. (4) Including the making of repairs and such ordinary alterations as are necessary to

the care of the premises and plant. (5) Including drivers and drivers' helpers. (6) Within a period of twelve months beginning on the 29th day of January, 1919.

Applying these requirements to Breal, we find that his case meets every one of them. Counsel for appellant contend that he was not covered (a), because his compensation was not included in the estimate, and (b) because he was not the kind of employee that the contract insured against.

The precise question then is, is the repairing of a gasoline boat used for the purpose of catching shrimp an operation incidental to the business of a shrimp factory? While counsel for appellant have been diligent in citing causes applying to the general law of insurance, they have cited no case covering this precise question.

Taking up the general attitude of the courts towards contracts of insurance, we find it universally held, and especially by the supreme court of Mississippi that "Insurance policies are construed most favorably to the insured." see *Germania Life Ins. Co. v. Bouldin*, 100 Miss. 660; *W. O. W. v. Bunch*, 115 Miss. 512. Under the terms of the policy, it would make no difference what sort of employee was injured, if it was a vessel hazard that caused the accident, the case would not be covered. On the other hand we contend that by the terms of the policy, any sort of employee otherwise covered by the contract would be insured against if he was hurt while working within the scope of his employment and not by a vessel hazard. In other words, it was the hazard that was excluded and not the employees that might be called upon to repair the vessels while at the plant, as they might be called upon to repair the process kettle, the oyster cars, and canning machines or any other instrumentality around the plant.

Before citing the authorities on which we rely, we shall first discuss those cited by opposing counsel. A reading of the several cases on the subject of liability insurance discloses clearly that the decision turns largely on the terms of the policy. We realize that it is hard to find a

case exactly like that presented here. In other words, "a gray mule" case, and both sides have to rely to a great extent on similarity in principle.

We shall not deal with the several cases cited by counsel which deal with insurance contracts generally. We agree with counsel that the contract must be interpreted as written but it is the law that they are construed most favorably to the insured. Counsel say at page 15 of their brief that repairing a vessel is an employment, the risk of injury in which a vessel hazard is too obvious to warrant discussion. A gasoline boat is a vessel. 8 Words & Phrases, 7296 et. seq. 4 Cyc. 196.

There is no doubt that a gasoline launch is a vessel, but the authorities cited by counsel do not show that repairing an engine alongside of a wharf and getting hurt by a process kettle in a factory is a vessel hazard.

Counsel cite the case of *May Creek Logging Company v. Pacific Coast Casualty Company*, 144 Pac. L. R. A. 1915C. 155. That case held that an employer's liability insurance policy would not cover an injury sustained by an employee through incompetence of the company's regular surgeon. That case is manifestly correct for the reason that the hazard did not arise out of the servant's employment.

Counsel cite the case of *Roth Tool Co. v. New Amsterdam Casualty Co.* 88 C. C. A. 569, 161 Fed. 709. In that case the contract expressly excluded cases of injury caused by explosion, an employee having been injured through the explosion of a pipe that was filled with explosive material.

The case of *Home Mixture Guano Company v. Ocean Accident and Guaranty Company*, 176 Fed. 600, cited by counsel involved the question of liability for an injury sustained in the rebuilding of a burned factory, whereas the policy covered only ordinary repairs, but excluded new construction.

The case of *Peoples Ice Co. v. Employers' Liability Assurance Co. Ltd.*, 161 Mass. 122, 36 N. E. 754, cited by counsel, involved a policy which covered the business of

cutting and storing ice. An employee engaged in building a storage house was injured by the building collapsing and the court held that the policy did not cover such case for the reason that the building of new structures was excluded from the policy.

The case of *Wollman v. Fidelity and Casualty Co.*, 87 Mo. App. 677, cited by counsel, involved a policy that insured a company against accidents occurring in the dry goods business. An employee was hurt while operating a machine for the polishing of rusty cutlery, and the court held that this was not a part of the dry goods business and not within the terms of the policy.

Counsel cite the case of *Kelly v. London Guarantee & Accident Co.*, 97 Mo. App. 623, 71 S. W. 711. It was there held that an employee injured by the personal negligence of one member of a firm of partners while on his own personal business was not covered by a policy which insured the firm as to partnership business.

In the case of *Maryland Casualty Co. v. Little Rock Ry. & Elec. Co.*, 92 Ark. 206, 122 S. W. 944, cited by counsel, it was held that where a policy was issued to one company and later assigned to another, that it did not cover new kinds of servants employed by the assignee. Counsel cite the case of *U. S. Zinc Co. v. General Accident Insurance Co.*, 125 Mo. App. 41, 102 S. W. 605. In that case a list of all the employees by name to be covered by the policy was attached thereto. The court held that the policy did not cover the case of an employee whose name was not on the list.

Counsel cite the case of *Frank Unneher Co. v. Standard Life Accident Co.*, 46 C. C. A. 490, 176 Fed. 16. The policy there expressly excluded liability to any person under age employed in violation of law. The court held that injuries to a child under age and employed in violation of law was not covered. The same can be said about *Tozer v. Ocean Casualty & Guarantee Company*, 94 Minn. 478, 103 N. W. 509, which was also a child case.

The case of *Buffalo Steel Co. v. Aetna Life Insurance Co.*, 136 N. Y. Supp. 977, also involved injuries to a child employed in violation of law. The case of *Fidelity and Casualty Co. of N. Y. v. Palmer Hotel Co.*, 179 Ky. 518, L. R. A. 1918C, page 808, cited by counsel, involved an elevator insurance contract. The policy provided that there should be no liability for injuries sustained while the elevator was being operated by a person not legally authorized and competent to operate an elevator. The court held that where a legally incompetent person was operating the elevator there was no liability.

Counsel cite the case of *Andrus v. Maryland Casualty Company*, 91 Minn. 358, 98 N. W. 200. That case, as we read it, sustains our position, and we think counsel must have cited it inadvertently. In the case of *Fidelity and Casualty Co. v. Phoenix Mfg. Co.*, 40 C. C. A. 614, 100 Fed. 604, cited by counsel, the court held that the question of coverage of a particular employee should be left to the jury.

Counsel cite the case of *East Carolina R. R. Co. v. Maryland Casualty Co.*, 145 N. C. 114, 58 S. E. 906. A very unusual sort of insurance policy was involved there. The court in construing the terms of the policy found that the wages for both the person injured and the person whose negligence caused the injury must be included in the policy. It seems in that case that the accident was due to the negligence of the president of the company, whose wages were not included in the contract, and whose negligence was expressly not insured against.

The case of *Employers' Indemnity Company v. Kelly Coal Co.*, 149 Ky. 712, 41 L. R. A. (N. S.) 963, cited by counsel held that a policy did not cover injuries sustained by a servant of an independent character. None of the foregoing authorities as we construe them, cover the point involved here. While it is difficult to find any case exactly like this one, we believe that the authorities which we shall now proceed to cite are as near in principle at least as exist in the books. *Fidelity and Casualty Co. v.*

*Lone Oak Cotton Oil & Gin Company*, 80 S. W. 541, 35 Tex. Civ. App. 260; *Hoven v. Employers' Liability Assurance Cor.*, 93 Wis. 201, 67 N. W. 46, 22 L. R. A. 388. We also rely upon the following decisions from the courts of other states: *Kingston Cotton Mills v. Liability Assurance Cor.*, 161 N. C. 562, 77 S. E. 682; *Travelers Insurance Co. v. Bright*, 24 Ohio C. C. 441; *London Guarantee and Accident Co. v. Oglesby*, 231 Pac. 186, 80 Atl. 57; *Dives v. Fidelity etc. Co.* 206 Pa. 199, 55 Atl. 950; *Cashen v. London Guarantee Co.*, 187 Mass. 188, 72 N. E. 957; *Andrus v. Maryland Casualty Co.*, 91 Minn. 358, 98 N. W. 200. As hereinabove contended, we think the intention of the parties was clear to insure the American Packing Company as to all of its employees, and only the two hazards of can manufacturing, and vessel, were excluded.

We have not been able to find any case construing the term "vessel hazard," and we assume that our friends on the other side cannot find any on this point, or they would have cited it. It is therefore a matter of interpreting the contract according to the ordinary meaning and acceptance of the words used therein. Every one knows that different operations or industries vary as to hazard, and further, that insurance rates vary in accordance with the hazard. The perils of the sea and dangers of navigation are entirely different hazards from that of a canning factory. Again, the dangers incident to can manufacturing are different and probably greater than in a factory where sea products are packed. Vessel and can manufacturing hazards being different than the one insured against, it is but natural that they should be excluded. We submit that the terms of the policy mean simply that if the insured's employee got hurt on account of a peril of navigation or danger of the sea, or while manufacturing cans, there would be no coverage under the policy because that was something not insured against. On the other hand, it is clear that Breal was not hurt by virtue of a peril of the sea or danger incident to navigation or to the operation of a vessel, but was hurt by a process kettle which was di-

rectly a part of the equipment of the canning factory. Suppose an oyster shucker or an employee whose duty it was to put shrimp in cans, was assigned to repair a gasoline engine in one of the boats lying along side the wharf and hurt there. Would our friends on the other side contend that he would not be covered under the policy. We have still a stronger case here because Breal, an employee, was hurt by a hazard of the factory, and any other employee whatever his duties were might have been hurt the same way. The vessel hazard therefore that was excluded by the policy had nothing to do with Breal's injury.

Bearing in mind always that under the terms of the policy, the insurer reserved the right to collect a premium on Breal's compensation and had a perfect right so to do under the contract, we submit that it is immaterial whether his compensation was actually included at the time the policy was issued or not.

So far as the declaration shows, Breal was not in the employ of the insured when the policy was taken out. We submit therefore that the court below rightfully sustained the demurrer to the declaration.

HOLDEN, J., delivered the opinion of the court.

This case involves the construction of an employer's liability insurance contract between the appellant and appellee. The appellant assurance corporation issued to the appellee packing company an insurance contract wherein it agreed to indemnify appellee against loss or damage from liability imposed by law for damages on account of bodily injuries sustained by its employees at its canning plant.

Following this, Charles Breal, an employee of appellee, was injured in the plant of the appellee and sued appellee to recover damages. The assurance corporation defended this suit under the contract, and by consent of all parties settled the case for three thousand, five hundred dollars, with the understanding that all of the legal rights of both

parties, the assurance corporation and the insured packing company, appellee, should be reserved, and a decision in the courts would be had to determine whether the assurance corporation was liable in the case under its contract of insurance.

Briefly stated, the facts are that the insured appellee packing company was engaged in the business of canning and packing shrimp at Biloxi, where it maintained a plant in which a large kettle for cooking shrimp and other products was kept and used. The insured had numerous employees engaged in its business of canning and packing shrimp. The injured employee, Charles Breal, was performing the duty of repairing a gasoline boat belonging to the insured packing company and used by it in the shrimp business, which boat was idle and was moored at the plant of the packing company for repairs and was being repaired by the said employee Breal. Immediately prior to being hurt Breal was working on this gasoline boat, and, having left it, was going through the packing room of the plant to get some article to be used in repairing the boat, when the cover of a large process kettle fell upon him and caused his injury, for which he sued, and is the original cause of the present suit.

The suit by Breal was predicated on the ground of liability for negligently failing to furnish a safe place in which to work, in that the top of the process kettle was so insecurely fastened to the kettle that it was liable to fall off and injure persons near it.

The appellant assurance corporation contends that it is not liable to the appellee packing company for the injuries to Breal, because: First, the insurance contract did not cover an injury to the employee Breal, as no premium was charged on the basis of his compensation, as it was not included in the schedule; and, second, because the employee Breal was injured while engaged in a "vessel hazard," which the policy expressly provides is not covered in the insurance contract.

The appellee contends in opposition: First, that the employee Breal was not injured by a "vessel hazard;" and, second, that the terms of the insurance contract included the employee Breal as a risk, as he was an employee within the designated class of employees mentioned and included under the terms of the insurance policy.

We shall here set out the material parts of the insurance contract, which are as follows:

"In consideration of sixty six and 80/100 dollars (\$66.80) estimated premium and the warranties of the assured hereinafter set forth the Employers Liability Assurance Corporation, Limited, of London, hereinafter called the corporation, hereby agrees to indemnify the American Packing Company of Biloxi, county of Harrison, state of Mississippi, hereinafter called the assured, against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any employee or employees of the assured, while within or upon the premises of the assured at the location described in the schedule, or the premises or ways adjacent thereto, by reason of the operation of the trade or business described in the schedule, including the making of repairs and such ordinary alterations as are necessary to the care of the premises and plant and their maintenance in good condition, and including drivers and drivers' helpers wherever employed in the service of the assured, provided such bodily injuries or death are suffered as the result of accidents occurring within the period of twelve months, beginning on the 29th day of January, 1918, at noon, and ending on the 29th day of January, 1919, at noon, standard time, at the place where this policy has been countersigned, subject to the following conditions."

Condition A limits the liability of the insurer to \$5,000 in any personal injury case and \$10,000 in a death case.

Condition B provides as follows:

"The premium is based on the entire compensation of the employees of the assured mentioned in the schedule,

during the period of this policy. If such compensation exceeds the sum set forth in the schedule, the assured shall pay the corporation the additional premium earned when determined; if such compensation is less than the sum set forth in the schedule, the corporation will return the unearned premium when determined; but the corporation shall receive or retain not less than twenty-five dollars it being agreed that this sum shall be the minimum earned premium."

Condition C is as follows: "This policy does not cover on account of injuries caused by any person unless his compensation is included in the estimate set forth in the schedule, or to or caused by: (1) Any child employed by the assured contrary to law, or any child employed under fourteen (14) years of age where no statute restricts the age of employment; (2) any person in connection with the making of additions to or structural alterations in or the construction of any building or plant, or in connection with wrecking or demolition of any building or plant, or any part thereof, unless a written permit is granted by the corporation specifically describing the work and an additional premium paid therefor."

Condition K is as follows: "The assured shall, whenever the corporation so requests, furnish the corporation with a written statement of the amount of compensation earned by his employees during any part of the period of this policy, and at the end of the period of this policy the assured shall furnish the corporation with such statement covering the full period of this policy. Any of the corporation's authorized representatives shall have the right and opportunity upon the request of the corporation to examine the books and records of the assured as respects compensation earned by the employees of the assured, provided such examination to be made within twelve months after the expiration of this policy and the assured shall render reasonable assistance; but the rendering of any estimate or statement or any settlement shall not bar the

examination herein provided for nor the corporation's right to additional premium."

The schedules of warranties attached to the policy so far as they are material herein are as follows:

"Statement 1: Name of assured, American Packing Company.

"Statement 2: Address of assured, Biloxi, Mississippi.

"Statement 4: Kind of trade or business, all operations incidental to the business of cannery (no can manufacturing and no vessel hazard).

"Clerical office employees.

"Estimated number of employees is —.

"Estimated compensation for period of policy, five thousand dollars.

"Premium rate per one hundred dollars of compensation, one dollar and thirty-three cents and six mills.

Five cents and five mills.

"The estimated compensation covers the compensation of all persons in the business carried on by the assured, at the locations mentioned in this schedule, including drivers and drivers' helpers (if no concurrent teams policy is carried with this corporation), and including the salaries or other compensation of president, vice president, secretary, treasurer, clerks and office employees, excepting as follows:

"No exception.

"Statement 10: The amount of compensation to employees for the twelve months to January 29th last, was five thousand dollars about."

It seems clear that the insurance was issued to cover any employee while within or upon the premises of the insured packing company by reason of the operation of the business, and this employment included the making of repairs necessary to the plant or any part thereof. But the insurance did not extend to injuries received by an employee through "vessel hazard," nor to any employee who was not in the designated class of employees named in the schedule whose compensation was included in the estimate as a

basis for the premium charged for the insurance. Therefore, if the injury was occasioned by "vessel hazard," the appellant assurance corporation would not be liable.

But we do not think the injury in this case was due to "vessel hazard" mentioned in the contract, because, as we understand it, the provision of "vessel hazard" injury means an injury received by an employee in the operation of a vessel, or while carrying on the necessary work of the plant through the operation of a vessel, and has reference to the risk of sea peril. The vessel upon which the injured employee was working at the time of the injury was an idle launch which was being repaired on the premises of the plant and was not in operation on the waters as contemplated by the contract.

But, more than this, the employee Breal was not injured while actually repairing the vessel, but received his injury by the top of a process kettle turning over on him within the building of the plant on the premises while he was engaged in the performance of his duty, incidental to and connected with the operation of the plant, as mentioned in the contract of insurance.

As to the second proposition presented by the appellant, we think that, under condition B in the contract, insurance against accident to the employee Breal was covered in the policy for the reason that his compensation, as one in the class of designated employees, was included in the estimated amount of compensation paid employees in the schedule upon which the premium was determined and charged. Therefore we are of the opinion that the insurance policy covered the risk of injury to the employee Breal as he was included as one of the employees in the schedule, and that his injury was not due to "vessel hazard," but was received while performing his duty in operations incidental to the business of the appellee packing company while within and upon the premises of the packing company.

*Affirmed.*

## PAYNE v. STATE ET AL.

[88 South 483, No. 21740.]

INTOXICATING LIQUORS. *Jamaica ginger* is "spirituous" or "vinous liquor" within act imposing penalties for sale.

Chapter 256, Laws 1912, imposing penalties to be recovered in a civil action where the sale or giving away of "spirituous" or "vinous" liquors is permitted, embraces preparations of whatever name, containing alcohol in large quantities, which are sold as beverages. It applies to Jamaica ginger, which contains only pure alcohol and the essence of ginger, where it is sold as a beverage and not as a medicine. *Lemly v. State*, 70 Miss. 241, 12 South, 22, 20 L. R. A. 645, distinguished (citing Words and Phrases, Spirituous Liquors).

APPEAL from chancery court of Lee county.

HON. A. J. MCINTYRE, Chancellor.

Suit by the state against R. S. Payne for the abatement of a nuisance. Judgment for complainant, and defendant appeals. Affirmed.

*George T. Mitchell* and *C. R. Bolton*, for appellant.

We desire to call the court's attention to the failure of appellee's brief to distinguish between "spirituous" liquor and "intoxicating" liquor, which is a very important distinction under the statute in question. The law does not include all "intoxicating" liquors. We have not contended that Jamaica ginger is not intoxicating, but we do say that it is not included in spirituous liquor under the terms of the law of 1912.

Counsel for appellees takes the position in his brief that because liquor contains alcohol, it is therefore spirituous, and yet he waives aside the Collotta case because he says that is malt liquor. If he is right in his contention, and the conclusions that he would draw from the authorities cited are correct, that a liquor is spirituous because it

125 Miss.]

Brief for Appellant.

contains alcohol, then it must be that this court was in error in the Collotta case in holding that the liquor in question, which contained a considerable amount of alcohol, was not spirituous liquor. The fact that a certain liquor contains alcohol cannot be the true test as to whether or not it is spirituous; else all intoxicating liquors, whether malt, vinous or alcoholic, would be spirituous. We think the Collotta case is very much in point and quote the following from it as completely refuting appellee's contention.

It is argued that the liquor as one of its elements contained alcohol, and that alcohol is a spirituous liquor and is also intoxicating, and therefore the legislature must have intended by the use of the word spirituous to give the remedy pursued against persons selling intoxicating liquors. It might be possible to construe the word as synonymous with intoxicating, but for the fact that vinous liquor is also intoxicating and sometimes contains a much greater percentage of alcohol than the liquor sold in this instance, and for this reason, if for no other, it is obvious that the legislature did not think that spirituous would cover vinous liquors.

Likewise appellee's brief brushes aside the case of *Lemly v. State*, 70 Miss. 241, as obsolete and cites in support of his position cases from other states. It may be true that the liquor laws themselves in force at that time are now obsolete, but it is also true that the definitions and construction given to terms then are just as modern now as they were then. What was spirituous liquor then is spirituous liquor now, and what was not spirituous liquor then can be no more spirituous now. This is especially true since it is to be assumed that the lawmakers knew the definition the courts had placed upon the words employed by it.

Counsel for appellees calls attention to the fact that the Lemly case was decided in 1892 and conditions are now different. The law in question in this case was passed in 1912 when conditions were also different from what

125 Miss.—57.

125 Miss.]

Brief for Appellant.

they are now, and we desire to re-iterate that the intent of the legislature is to be determined as of that date and not now, a matter which appellee's brief evades altogether.

It is asserted that Jamaica ginger is either spirituous liquor or it is medicine. This is not necessarily so. It might be simply alcohol. If spirituous covers all liquors containing alcohol, why did the legislature of 1912 in chapter 214 use the term alcoholic. (We say in conclusion that by common usage no one thinks of Jamaica ginger as a spirituous liquor, a term ordinarily applied to regularly prepared beverages, and the legislature did not include it in chapter 256 of the Laws of 1912. We therefore again submit that the case should be reversed.

*H. Cassidy Holden*, special assistant attorney-general for the state.

It is further contended by the appellant that Jamaica ginger is not spirituous liquor, and is without the scope of the statute, and that therefore, the chancery court had no jurisdiction to entertain the bill of complainants. Sections 2121 and 2122 of Hemingway's Code read as follows:

"That any person who may sell or give away vinous or spirituous liquors unlawfully, or who shall allow the same to be sold or given away at his place of business, for any purpose whatever, or shall permit any person not interested in or connected with such business to keep and drink or give away at such place of business any vinous or spirituous liquors, shall be subject to pay to the state, county, city town or village, where the offense is committed, each, the sum of five hundred dollars; and the state, county, city, town or village, or taxpayer of the state county, city, town or village in the name thereof, or the state revenue agent, or any sheriff within the county acting for them, may sue for and recover civilly, either jointly or separately, each said sum of five hundred dollars; and such civil suit may be commenced by attachment without bond (Laws 1912, ch. 256, in effect March 16, 1912).

The chancery court shall have concurrent jurisdiction with courts of law to entertain suits under the preceding section for the enforcement thereof instituted by the state, county or any city, town or village, or by any taxpayer thereof, in the name of the state, county, city, town or village, or by the state revenue agent, or by any sheriff within his county acting for them, and the chancery court shall have authority to suppress as a nuisance any place of business where the preceding section is violated, and by proper judgments and orders, punish and restrain the violators thereof. (Laws 1910, ch. 134. In effect April 15, 1910).

"Spirituous liquors, are defined as follows: (Words and phrases) Spirituous liquors is that which is in whole or in part composed of alcohol, extracted by distillation, such as whiskey, brandy or rum; these being regarded as spirituous and intoxicating liquors, without the necessity of proof." *Marks v. State*, 48 So. 864, 868, 159 Ala. 71, 133 Am. St. Rep. 20. Pure alcohol is within the term spirituous and intoxicating liquors. *Marks v. State*, 48 So. 864, 868, 159 Ala. 71, 133 Am. St. Rep. 20.

Alcohol is judicially recognized as a spirituous and intoxicating liquor. *Cureton v. State*, 70 S. E., 333, 135 Ga. 660. In *State v. Giersch*, 98 N. C. 720, the court said: "spirituous means containing, partaking of, spirit; having the refined, strong, ardent quality of alcohol in greater or less degree. Hence spirituous liquors imply such liquors as above defined, as contain alcohol and thus have spirit—no matter by what particular name denominated, or in what liquid form or combination they may appear. See also *State v. Nash*, 97 N. Car. 514, in which the question is discussed but not decided; and *Jones v. Surprise*, 64 N. H. 243, where it was held that a sale of intoxicating wine is prohibited by a statute prohibiting the sale of spirituous liquors. *State v. Agalos*, 107 Am. 314; *State v. Kollar*, 186 Pac. 968; *State v. Hosmer*, 175 N. W. 683. (S. C.) If a grocer sells Jamaica ginger and lemon extract, knowing that they are bought to be used as a beverage, he violates

the liquor law, if they contain the prohibited percentage of alcohol. *State v. Johnson*, 101 S. E. 851.

In *State v. Good* (W. Va.), 49 S. E. 121, it was held that proof of an unlawful sale of a mixture, preparation or liquid called Rikk, which contains alcohol and will produce intoxication, will sustain a conviction upon an indictment charging the unlawful sale of spirituous liquors, wine, porter, ale, beer, and drinks of like nature. *McNeil v. Horan*, 153 Ia. 630, 133 N. W. 1070 (Centennial Tonic Bitters); *Clement v. Dwight*, 137 App. Div. 389, 121 N. Y. S. 788; *Berner v. McHenry*, 169 Ia. 483, 151 N. W. 450.

Where an alleged medicinal preparation containing alcohol is held to come within the purview of a statute for bidding the sale of intoxicating liquors without a permit or license, the fact that the defendant makes a sale thereof in good faith as a medicine will not be a defense, the intent or motive with which the sale is made being immaterial. *Com. v. Hallett*, 103 Mass. 452; See, also, *State v. Benson*, 154 Ia. 313, 134 N. W. 851. Thus in *Com. v. Hallett*, *supra*, it was held that the trial court properly ruled as follows: "that the defendant might show that the article (plantation bitters) sold was a medicine, or that it was not intoxicating liquor, but that his statement that he sold it as medicine in good faith, and proof that it was generally sold as a medicine, would not be a defense; that it was his duty to ascertain what was the character of the article he sold, and if he sold it without ascertaining its true quality, and it was intoxicating liquor, he would be liable therefor." *King et al. v. State*, 58 Miss. 737; *State v. Marshall* (Miss), 56 So. 797. *Collotta v. State*, this court held through Justice Cook that beer, being a malt liquor, did not come within chapter 256, Laws 1912, section 2121, Hemingway's Code. This case is not in point with the case at bar for the reason that Jamaica ginger is not a malt liquor, and of this the court will take judicial notice. Jamaica ginger is either a spirituous liquor or it is a medicine. It cannot be defined as a malt liquor.

125 Miss.]

Opinion of the Court.

The case of *Lemly v. State*, 70 Miss. 241, is not in point with the case at bar. In the *Lemly* case it was held that pure alcohol, or alcohol unmixed with other ingredients is not spirituous liquor within the meaning of chapter 398 of the Laws of 1880, *contra*, see cases above cited. A reading of this case will readily disclose its dissimilarity to the case at bar from the standpoints of both law and facts. This case was decided in 1892. At that time, whiskey, wine and beer and the usual alcoholic drinks could be obtained lawfully in this state.

It is respectfully submitted that this case was decided by a court confronted with an entirely different situation from that which was presented to the court below in the case at bar. The decision in the *Lemly* case has become obsolete and cannot longer be authority.

It is submitted that the judgment of the lower court should be affirmed.

ETHRIDGE, J., delivered the opinion of the court.

The state of Mississippi and county of Lee filed a bill in the chancery court against the appellant, Payne, alleging that the appellant was engaged in the business of selling spirituous and intoxicating liquors and drinks, consisting mainly of what is known as Jamaica ginger, lemon, vanilla, and pineapple extracts, consisting of eighty per cent. to ninety per cent alcohol, which, if drunk in the usual way that intoxicating liquors are drunk, will and do cause intoxication, and that the appellant had sold named persons such liquors, and that he conducted a store, carrying on a small mercantile business, in connection with which he sells intoxicating liquors and carries them in the said storehouse for that purpose; and prayed for a judgment against the appellant for five hundred dollars for the state of Mississippi, and five hundred dollars for Lee county, and for a decree abating said place of business as a nuisance. The defendant denied the allegations of the bill with reference to the sale of said articles, and denied that said articles

were spirituous liquors. Proof for the plaintiff showed that the appellant had sold Jamaica ginger to numbers of people in such quantities and under such circumstances as would warrant the belief that they were sold as beverages, were used as beverages, and produced intoxication in the buyers. The chancellor held that the sale constituted a sale of spirituous liquors within the meaning of chapter 256, Laws of 1912 (Hemingway's Code, section 2121).

It is the contention of the appellant that the preparation which he sold consisted of alcohol and the essence of ginger, and was not spirituous liquors within the meaning of said statute. The statute reads as follows:

"That any person who may sell or give away vinous or spirituous liquors unlawfully, or who shall allow the same to be sold or given away at his place of business, for any purpose whatever, or shall permit any person not interested in or connected with such business to keep or drink or give away at such place of business any vinous or spirituous liquors, shall be subject to pay to the state, county, city, town or village, where the offense is committed, each, the sum of five hundred dollars; and the state, county, city, town or village, or any taxpayer of the state, county, city, town or village in the name thereof, or the state revenue agent, or any sheriff within the county acting for them, may sue for and recover civilly, either jointly or separately, each said sum of five hundred dollars; and such civil suit may be commenced by attachment without bond."

The appellant relies principally upon the case of *Lemly v. State*, 70 Miss. 241, 12 So. 22, 20 L. R. A. 645, in which opinion this court, speaking through Chief Justice CAMPBELL, held that pure alcohol was not a spirituous liquor within the meaning of chapter 39, Code of 1880. It is true that the syllabus of this opinion states that alcohol is not vinous or spirituous liquor within the meaning of chapter 39, Code of 1880, and that prior to the passage of the Laws of 1886, p. 35, alcohol was specifically first mentioned in the laws prohibiting the sale of spirituous and intoxicating liquors. The reasoning of this opinion is that

the legislature did not contemplate alcohol prior to 1886 because alcohol was not usually sold as a beverage and was regularly sold by druggists for certain purposes, and that it was not the intention of the legislature to embrace pure alcohol in prohibiting the sale of spirituous liquors because such liquors as were then sold as beverages were not prepared from alcohol, or from pure alcohol, but were distilled. In that case the opinion was a correct construction of the legislative intent as applied to the laws in the Code of 1880 and the evils with which that Code was dealing. The true purpose of the rules of construction is to ascertain the legislative intent, and all statutes bearing on the subject may be considered. The general definition of spirituous liquors would include alcohol, and most of the authorities of other states in defining the term "spirituous liquors" make it embrace alcohol. The Standard dictionary defines "spirituous" as follows:

"Containing alcohol; especially, containing a large percentage of alcohol; intoxicating; ardent; as, spirituous wine; specifically, distilled, in distinction from fermented or brewed."

In Words and Phrases, First Series, it is said:

"Spirituous liquors technically and strictly include all liquors which contain alcohol in appreciable quantities. In this sense vinous and malt liquors are also spirituous, in that each contains spirits of alcohol; but in ordinary acceptance the term 'spirituous' liquors imports distilled liquors, and in a statute requiring a license to sell spirituous, vinous, or malt liquors the term is employed in its ordinary sense, as indicated from the use of the super-added terms 'vinous' and 'malt,' which have no office to perform unless the phrase 'spirituous liquors' is confined to the definition which it has in common parlance, denoting liquids which are the results of distillation."

"Spirituous liquors imply such liquors as contain alcohol, and thus have spirit, no matter by what particular name denominated, or in what legal form or combination they may appear. Hence distilled liquors, fermented liq-

uors, and vinous liquors are all spirituous liquors. 'Spirituous' means containing or partaking of spirit; having the refined, strong, ardent quality of alcohol in greater or less degree."

In chapter 256, Laws of 1912 (Hemingway's Code section 2121), above set out, the language used in describing liquors is "vinuous or spirituous." This language must be interpreted in the light of the legislative history and general course of judicial definition, and it is not governed solely by the definition laid down in the case of *Lemly v. State*, *supra*. The language in that case is not one of precise definition, but is one of interpretation in the light of legislative history and public policy. However, the court has condemned the sale of liquors which contained high percentage of alcohol as beverages both prior to and subsequent to the decisions of the *Lemly Case*, and, whatever may be said as to the correct distinction of pure alcohol and beverages, a sale of beverages containing high percentages of alcohol, mixed so as to make palatable as a drink and not as a medicine, is condemned by the law as coming within the definition of spirituous liquors.

In the case of *King & Wall v. State*, 58 Miss. 737, 38 Am. Rep. 344, it was held that where the appellants were indicted for selling vinous and spirituous liquors without license, and the defendants had been selling a compound called "Home Bitters," which they claimed was a medicine, though it contained thirty per cent. of alcohol, the other ingredients being bark, peelings, and seeds of trees, fruit, herbs, etc., and it was sold as any other merchandise without any inquiry by the seller as to the purpose for which it was being bought, and the witnesses for the prosecution testified that they bought it because of the alcohol contained in it, and for the purpose of producing intoxication, and the trial court instructed the jury, in effect, that if the compound was intoxicating, and was sold by defendant as a spirituous beverage, and not as a medicine, they ought to find the defendants guilty. And for the defendants the court

125 Miss.]

Opinion of the Court.

charged the jury, substantially, that if the defendants sold the compound in good faith as a medicine, and not as a spirituous beverage, they ought to be acquitted, notwithstanding the fact that it contained spirituous liquors sufficient to intoxicate, and this court held these instructions to properly present the law. To the same effect are *Bertrand v. State*, 73 Miss. 56, 18 So. 545; *Goode v. State* 87 Miss. 499, 40 So. 13.

We think the proof in the present case shows with sufficient clearness that the appellant was selling this Jamaica ginger as a beverage. At least he knew it was being so used, or it was sold in such quantities as to indicate such knowledge. Since 1908 a sale of alcohol has been prohibited except under very restricted conditions not applicable to this case. Under the present policy of absolute prohibition, and especially from 1908 to date, it is plain that the legislative policy has been to prohibit the sale of intoxicating liquors under whatever name and under whatever form proposed to be sold. The acts of 1910 and of 1912 used terms, and enacted laws, with this end in view; and the purpose of enacting chapter 256, Laws of 1912, was to enable the authorities charged with the enforcement of the liquor laws to suppress the liquor traffic by imposing penalties to be recovered in civil actions, and by injunction in addition to the regular criminal laws.

We are therefore of the opinion that the liquor sold in the present case comes within the purview and purpose of chapter 256, Laws of 1912 (Hemingway's Code, section 2121), and the judgment will be affirmed.

*Affirmed.*



# INDEX.

## ACCOMPLICE.

1. *Criminal law. "Accomplice" defined; question for court whether witness was an "accomplice" when facts undisputed.*

One who is present aiding, assisting, abetting, and encouraging the commission of a crime is an accomplice, and, where there is no conflict in the testimony as to the acts, conduct, or participation of a witness in an alleged crime, it is a question of law for the court as to whether the witness was in fact an accomplice. *Dedeaux v. State*, 326.

2. *Criminal law. Court should instruct as to weight of accomplice testimony, but language of instruction is in court's discretion.*

While a conviction may be had on the uncorroborated testimony of an accomplice, the court should instruct the jury that the testimony of an accomplice is to be weighed with caution, but the language in which the cautionary instruction is stated must, in a large measure, be left to the discretion of the trial court. *Ib.*

## ACKNOWLEDGMENT.

*Corporation's deed need not be acknowledged nor filed for record as between parties.*

A conveyance of land by a corporation, in order to be valid as between the parties thereto, is not required to be acknowledged by the officer executing the same for the corporation, nor filed for record; such a deed being valid without being so acknowledged and filed for record; acknowledgment and recording being required for the purpose alone of constructive notice to others subsequently dealing with the land conveyed. *Mexican Gulf Land Co. v. Globe Trust Co.*, 862.

## ACTIONS, RIGHT AND CAUSE.

1. *Brokers. Expenses incurred by owner's authority in canceling leases, recoverable, though no commission allowed.*

While no commissions are recoverable by a broker, where they are based on the amount received for the land by the owner, and the sale has failed through no fault of the owner, the broker may nevertheless recover expenses incurred by the owner's authority in securing options to cancel leases to enable the owner to deliver possession to the prospective buyer. *Lee v. Greenwood Agency Co.*, 177.

2. *Divorce. Acts of cruelty need not be malicious to constitute ground parties in pari delicto.*

In an action for divorce based upon the ground of habitually cruel and inhuman treatment, it is not necessary that the acts of alleged cruelty

## ACTIONS, RIGHT AND CAUSE.

## ACTIONS, RIGHT AND CAUSE—Continued.

shall be malicious; such acts are to be judged by the effect produced, and the motives prompting them are immaterial. *McNeill v. McNeill*, 277.

3. *Divorce. Sufficient if acts of cruelty create reasonable apprehension of danger to life or health.*

In an action for divorce based upon habitually cruel and inhuman treatment, in order that the complaining party may be entitled to relief, it is not necessary that the acts of alleged cruelty shall be, in fact, menacing to the life or health of complainant; but, if the alleged acts of cruelty are such as to create in the mind of the complainant a reasonable apprehension of such danger, relief should be granted. *Ib.*

4. *Charities. Bill held to show complainant had no right to enforce alleged trust.*

Where a bill in chancery to enforce an alleged trust shows that the trust, if any exist, is for the benefit of a named school, and is not brought in the name of the school, or by its trustees, but by parties living in the community who made some contributions to a fund to buy the alleged trust property for the use of the school, there is no such right in the complainant as will warrant equity in taking cognizance of the suit and rendering a decree, and where such bill is demurred to the demurrer ought to be sustained. *Freedman's Aid & Southern Education Soc. v. Scott et al.*, 299.

5. *Master and servant. Assault on servant by another servant in course of employment actionable.*

Where a master employs a dangerous, quarrelsome, and vicious servant, or retains him in his service after knowledge of his dangerous character, and such servant, while in the course of his employment and in furtherance of the master's business, commits an assault on another servant, who is also employed in the master's business and is acting in furtherance of the master's business, the master is liable for the injuries resulting from the wrongful assault. *Hines, Agent, v. Green*, 476.

6. *Master and servant. Railroad engineer's assault on conductor held actionable.*

Where a conductor of a switching crew, including an engineer, was engaged in moving an engine and passenger cars from one point in the yard to another point therein, and where to complete the movement it is necessary to pass through a switch, and where the engine was halted because the switch was not thrown, and the engineer because of such fact, assaults the conductor because the switch is not

## ACTIONS, RIGHT AND CAUSE.

## ACTIONS, RIGHT AND CAUSE—Continued.

thrown, so that the engine may proceed to its destination, and where it was the conductor's duty to have the switch thrown, the engineer and the conductor are acting in the course of their employment, about the master's business, and the master is liable for a wrongful assault by the engineer on the conductor. *Ib.*

7. *Carriers. White passenger compelled to ride with negroes in coach designated for white persons may recover.*

Under our separate coach law (section 4059, Code of 1906; section 6687, Hemingway's Code), a white passenger who, after notice and objection to the conductor, is compelled to ride in a compartment with negroes, in a coach designated for white persons, may recover damages from the railroad for violation of the statute; and this is true even though there were other coaches on the train for white persons, and the sign designating the coach had been changed by some outside agency. *Payne, Director General of Railroad, v. Stevens, et al.*, 582.

8. *Sunday. Sunday contract void, but recovery may be had for quantum valebat where property accepted on subsequent secular day.*

A written contract executed on Sunday is void, and no recovery can be had thereon, but recovery may be had for *quantum valebat* in an action of *assumpsit* upon an implied promise to pay for property which was accepted and converted upon a subsequent secular day. *A. Goletti, Inc., v. Andrew Gray Co.*, 646.

9. *War. Alien enemy may defend and hence may recover property distrained.*

A proceeding to recover property which has been seized under a distress for rent is essentially defensive in its nature, and an alien enemy, whose property has been seized under a distress for rent, may maintain the statutory proceedings to recover the property and assert such defensive rights as he may have under the lease. *Fronkling v. Berry*, 763.

10. *Drains. Landowner held not entitled to damages to crops through enlargement of canal.*

The landowner adjoining a right of way of a drainage canal cannot recover damages for injuries sustained to his crops caused by the damming up of the canal, which was made necessary in order to enlarge and dig deeper the canal, when this work is done in a proper workmanlike manner, in accordance with the plan legally adopted for its performance by the drainage commissioners. For all of this damage he, or his predecessor in title, is supposed to have been paid when the right of way was granted to the drainage district. *Moore v. Swamp Dredging Co., Inc.*, 842.

## ADVERSE POSSESSION.

## ACTIONS, RIGHT AND CAUSE—Continued.

11. *Drains. Successor of grantor to drainage district cannot sue for damages from construction or maintenance.*

When a landowner has granted to a drainage district a right of way over his land for the purpose of constructing and maintaining canals and ditches, his successor in title cannot thereafter sue the district or the contractor for damages which resulted, either from its construction or maintenance, if the work was done in a proper workmanlike manner. All these damages caused to the landowner are presumed to have been paid for because of the grant. *Moore v. Swamp Dredging Co., Inc.*, 842.

12. *Drains. No action by landowner for damages for construction or maintenance of ditches in proper workmanlike manner.*

Though the landowner may be damaged because of the doing of this work in a proper workmanlike manner, there was no invasion of his legal rights, and it is a case of *damnum absque injuria*, for which no action may be maintained. *Ib.*

13. *Cancellation of instruments. Petition held insufficient to state grounds for cancellation of corporation's deed to its secretary.*

A bill in equity by the grantor in a deed against the grantee to set aside and cancel such deed as a cloud upon the grantor's title, the grantor being a corporation, which alleges as grounds for cancellation of such deed that the consideration therein mentioned is "feigned and fictitious;" that the grantee in the deed was the secretary of the grantor corporation, and joined in the execution of the deed to himself, together with the president of the corporation; that the deed was not legally acknowledged by the president of the corporation—states no grounds for cancellation of such deed. *Mexican Gulf Land Co. v. Globe Trust Co.*, 862.

## ADVERSE POSSESSION.

1. *Possession must be exclusive, under claim of right, and for statutory period; city using railroad right of way as street held to acquire title to extent of use only.*

To acquire land by adverse possession, the possession must not only continue for the statutory period, but it must be exclusive and under claim of right; and, where a city uses a portion of a railroad right of way as a street for the passage of pedestrians and vehicles only, not excluding the railroad from the said land, it acquires only to the extent of the use, and has no right to place structures on the land, nor to permit others to do so. *Alabama & V. Ry. Co. v. Joseph, et al.*, 454.

2. *Running trains over railroad right of way held use of entire right of way in absence of inclosure by adverse claimant and adverse use.*

The running of trains over the right of way is a user of its entire right

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ALIMONY.

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## ADVERSE POSSESSION—Continued.

of way, unless some part is inclosed by the adverse claimant and used adversely to the railroad for the statutory period. *Ib.*

3. *Adverse occupation of railroad right of way for ten years gives title.*

Where a stranger in title to a railroad company obtains adverse, open, notorious, and exclusive possession of a part of its right of way and so occupies it for a period of ten years, claiming it as his own, he thereby obtains title by adverse possession. *Mobile & O. R. Co. v. Strain*, 697.

4. *User of railroad right of way and cultivation of garden under claim of title gives title after ten years.*

Where the owner of property fences in a part of a railroad right of way immediately adjoining his property and continuously uses it and cultivates it as a garden, claiming title thereto, and has exclusive possession of it for a period of ten years, he acquired title thereto by adverse possession. *Ib.*

5. *Permissive use of right of way personal, and permission ceases when permitted party sells his adjoining property in connection with which permission given.*

Where the owner of a hotel by permission fences an adjoining lot which is a part of the right of way of a railroad company, this permissive use of the right of way is personal and ceases when the hotel is sold; and title by adverse possession may be obtained of this lot by remote grantees of the property by exclusive, open, notorious, and adverse possession thereof under claim of title for a period of ten years. This possession is constructive notice of their adverse claim to the railroad company. *Ib.*

6. *Title may be obtained to part of railroad right of way not necessary to business as common carrier.*

Section 184 of the Constitution of 1890 makes railroads public highways. Title by adverse possession may be acquired of a part of its right of way not in actual use, and not necessary for the transaction of its business as a common carrier. *Ib.*

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ALIMONY.

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1. *Divorce. Chancery court may allow such alimony as is equitable and just with regard to circumstances.*

The power of a chancery court to award alimony to a wife in a divorce proceeding is measured by section 1673, Code of 1906 (section 1415, Hemingway's Code), and is to make such allowance therefor as may seem equitable and just, having regard to the circumstances of the parties and the nature of the case. *Ramsay v. Ramsay*, 185.

## ANIMALS.

## ALIMONY—Continued.

2. *Divorce. Alimony may be awarded wife, although husband without property.*

Alimony may be awarded the wife in a divorce proceeding, although the husband is without property and must support himself and pay the alimony out of his future earnings. *Ramsay v. Ramsay*, 185.

3. *Divorce. Financial situation of parties should be considered.*

When the husband is without property and must support himself out of his own earnings, and the wife is able to and does earn something by her own labor, that fact should be taken into consideration in determining what amount the husband should contribute to her support, unless the prospective earnings of the husband are sufficient in amount to make it equitable and just for him to bear the whole burden of the wife's support. *Ib.*

4. *Divorce. Husband's failure to pay alimony under decree prima-facie evidence of contempt.*

The failure of the husband to comply with the decree providing for the payment of alimony is prima-facie evidence of contempt, to purge which the burden is upon him to prove his inability to pay. *Ib.*

5. *Divorce. Husband should not be committed, when he can pay alimony only of future earnings.*

A husband should not be committed to prison until he pays the arrears of alimony allowed to the wife, when he has no property and can pay the alimony only out of his future earnings. *Ib.*

6. *Divorce. Husband not in contempt for failure to obtain sureties, when he is unable to do so.*

Under section 1673, Code of 1906 (section 1415, Hemingway's Code), the court may, "if need be, require sureties for the payment of the sum so allowed" to the wife as alimony; but, when the giving of such sureties is ordered, the husband is not in contempt until he fails to obey the order, and not then if his failure to obey the order resulted solely from his inability to do so. *Ib.*

7. *Divorce. Court awarding alimony may fine husband for wilful failure to pay.*

The court which rendered a decree awarding alimony to the wife may enter a fine against the husband for failure to pay the alimony, when the failure to pay was willful. *Ib.*

## ANIMALS.

1. *Statute imposes absolute liability on owner of trespassing stock.*

Under the stock law contained in chapter 50, Code of 1906 (chapter 102, Hemingway's Code), the owners of the domestic animals there-

## APPEAL AND ERROR.

## ANIMALS—Continued.

in named are required to fence such animals against the crops, and crops may be cultivated on uninclosed lands; and section 2222, Code of 1906 (section 4541, Hemingway's Code), being part of said stock law, makes the owner of trespassing stock absolutely liable for damages done by them to the crops of others, and questions of due care and negligence in confining stock are eliminated. *Minor v. Dockery*, 727.

2. *Agent in control of trespassing stock not liable for damages.*

A mere agent in control of the cattle, horses, and mules belonging to his principal is not liable for damages done by such animals in trespassing upon the crops of another, under the principle that an agent is liable to no one except his principal for damages resulting from an omission or neglect of duty in respect to the business of the agency. *Ib.*

## APPEAL AND ERROR.

1. *Amount of supersedeas bond on appeal from decree of sale to satisfy lien stated.*

Where a court decrees a sale of real estate to satisfy a lien established by the court to obtain an appeal with supersedeas, a bond is required in double the value of the property ordered sold, or in double the judgment rendered against the property, taking whichever is the smallest as a basis for the bond. *Beekman, et al., v. Bost*, 77.

2. *Partition. Charging defendant's interest with fee of complainant's solicitor error.*

Where there is a real contest between the complainants and the defendants as to whether or not the complainants are entitled to maintain their suit, and the partition of the property is resisted in good faith by the defendants, the defendants are entitled to be represented by counsel of their own choice, and it is error to charge their interest with any part of the fee of the solicitor of the complainants. *Brower et al. v. Rosenbaum & Little et al.*, 87.

3. *Damages for loss of arm held grossly inadequate; where damages inadequate; judgment will be reversed only as to amount.*

Where, in a suit for damages by a laborer against his employer, the jury found that the injury was the result of the negligence of defendants, the verdict of the jury awarding plaintiff the sum of three hundred dollars as compensation for his suffering and for the loss of an arm is grossly inadequate, and the court on appeal will reverse the judgment of the lower court in so far as it adjudges the amount of damages to be recovered, but will allow the judgment as to liability to stand. *McLaughlin v. R. W. Fagan Peel Co.*, 116.

125 Miss.—58.

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APPEAL AND ERROR

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## APPEAL AND ERROR—Continued.

4. *Appeal will be dismissed where the real purpose is not to obtain reversal but affirmance.*

An appeal will be dismissed where the real purpose is not to obtain a reversal of the decree but to have it affirmed; there being no actual controversy of either law or of fact to be decided. *Smith v. Citizen's Bank & Trust Co.*, 139.

5. *Criminal law. Refusal to instruct that accused's failure to testify should not operate to his prejudice held error.*

It is error to refuse instruction telling jury that failure of defendant to testify shall not operate to his prejudice, under section 1918, Code 1906 (Hemingway's Code, section 1578). *Funches v. State*, 141.

6. *Insurance. Where reasonable men may draw different conclusions from evidence, verdict not set aside; evidence showed insured railway mail clerk did not jump from car, but fell out.*

The jury is the judge of the credibility of the witnesses and the weight of the evidence; and where the facts and circumstances are such that reasonable men may draw different conclusions therefrom, the verdict of a jury will not be set aside as being insufficient to support a verdict. The facts in this case examined, and held sufficient to support the verdict. *Fraternal Aid Union v. Whitehead*, 153.

7. *Matters not affecting appellant's rights not considered.*

An assignment of error will not be considered, when the decision of the question it presents will have no effect upon the rights of the appellant. *Ramsay v. Ramsay*, 185.

8. *Motion attacking correctness of decision in effect a suggestion of error; motion to modify judgment held in effect an additional suggestion of error.*

A motion which only attacks the correctness of the decision is in effect a suggestion of error. Where a decision on appeal has been rendered against a party, and where a suggestion of error has been filed by such party and overruled, and where the judgment entered by the clerk is in accordance with the decision, no further attack on the decision is permitted, and a motion to modify the judgment, which only challenges the correctness of the decision of the court, is in legal effect an additional suggestion of error, and will be stricken from the files by the court of its own motion. *Crudup v. Roseboom*, 205.

9. *When stenographer's transcript of evidence will be stricken under statute stated.*

A stenographer's transcript of the evidence, filed pursuant to a notice so to do, given within the time prescribed by law, will not be stricken

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APPEAL AND ERROR.

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## APPEAL AND ERROR—Continued.

from the record for any reason, "unless it be shown that such notes are incorrect in some material particular and then only in cases where such notes have never been signed by the trial judge, nor been agreed on by the parties, nor become a part of the record as provided by this act." *McBee & Gossett v. Cahaba Const. Co. et al.*, 227.

10. *Striking stenographer's transcript of evidence no ground for dismissal of appeal.*

An appeal will not be dismissed for the reason that the stenographer's transcript of the evidence has been stricken from the record. *Ib.*

11. *Objection to revivor in administrator's name cannot be made for first time on appeal.*

Since a suit to cancel a cloud on title may, under some circumstances, be revived on the death of the complainant in the name of his administrator (*Criscoe v. Adams*, 85 So. 119), an objection to such a revivor cannot be made for the first time in the supreme court on appeal. *Weaver v. Turner*, 250.

12. *Bastards. Instruction limiting consideration to intercourse by defendant held erroneous under evidence.*

In a bastardy case it is error to instruct the jury that the "sole and only question in this case is whether or not the defendant had intercourse with the prosecutrix at or near the proper time which in the course of nature would or might make him the father of her child," when there was evidence to support the theory that another man had probably had intercourse with the prosecutrix within the period of gestation. *Wilson v. Hendrix*, 273.

13. *Criminal law. Evidence as to finding of other property similar to that stolen at different place held inadmissible.*

In a prosecution for the larceny of particularly described sheep, where the evidence shows that the sheep alleged to have been stolen had been killed and buried in a certain pit, it is erroneous to admit testimony that other sheep were found buried at a different place and in another pit. *Dedeaux v. State*, 327.

14. *Criminal law. That other sheep of same owner disappeared held inadmissible.*

In a prosecution for the larceny of particularly described sheep, it is error to admit testimony that several months prior to the alleged theft the owner of the particular sheep alleged to have been stolen also owned a large number of other sheep, and that they had disappeared from the range at the time of the trial. *Ib.*

## APPEAL AND ERROR.

## APPEAL AND ERROR—Continued.

15. *Supreme Court judge has power to grant appeals with supersedeas from judgment establishing lost record.*

A judge of the supreme court has power, under section 4908, Code 1906 (section 3186, Hemingway's Code), to grant an appeal with *supersedeas* to the supreme court from a final judgment of a circuit court establishing a lost record of such court. *Bilzoni Land Co. v. Robertson, State Revenue Agent*, 338.

16. *Judgment, establishing lost record, from which appeal with supersedeas pending, not admissible in another suit as evidence.*

The record of a court, which has been lost and which has been re-established under section 3173, Code of 1906 (section 2514, Hemingway's Code), and from which judgment re-establishing it an appeal with *supersedeas* has been prosecuted to the supreme court and is pending, cannot be used in evidence in another suit pending such appeal. The effect of the *supersedeas* is to prevent the use of the judgment during the time it is superseded. The judgment appealed from lies dormant, and no action can be taken which depends upon the judgment for its validity. *McConnico v. State*, 107 Miss. 265, 65 So. 243, cited. *Ib.*

17. *Master and servant. "Willfully entice away or knowingly employ" servant implies actual knowledge.*

In an action brought by an employer against a third person for willfully interfering with, enticing, or knowingly employing a servant (who had entered into a contract for a given period), without obtaining the consent of the employer, it was error to charge the jury that it would find for the plaintiff if the defendant at the time of the hiring "knew or ought to have known that said contract had not expired." The words of the statute "shall willfully interfere with, entice away, or knowingly employ" mean that the party hiring must have known of the contract at the time of the hiring, and not that he might have known by diligent or reasonable inquiry. The knowledge must exist at the time of the hiring. *Beale v. Yazoo Yarn Mill*, 370.

18. *Master and servant. Instruction on knowledge of prior hiring held incorrect.*

In such case it is reversible error to instruct the jury that if they believe from the evidence that the defendant had notice of any fact or circumstance sufficient to put an ordinarily prudent person upon inquiry, and that such inquiry would have developed the fact that the laborer's contract had not expired, and after such fact or circumstance came to defendant's notice he hired the tenant while the contract was in effect, to find for plaintiff. The knowledge of the first

## APPEAL AND ERROR.

## APPEAL AND ERROR—Continued.

contract must exist at the time of the hiring, and mere circumstances which in themselves are insufficient to impute knowledge, but which must be coupled with other facts which would or might be disclosed by inquiry, do not supply the requisite proof. *Ib.*

19. *Master and servant. Instruction an ratification of breach of contract of hiring by continuing in service held incorrect.*

In an action by an employer against another for hiring a servant before his contract of service expired, where the evidence for the defendant showed a breach of the contract by the employer prior to the hiring by the defendant, it was error to instruct for the plaintiff that, even though the jury may believe from the evidence that one or more of the servant's family were discharged without cause, or that the servant or members of his family were occasionally laid off without cause, and notwithstanding these facts the servants continued after such facts in the employment and worked under his contract, this constituted a ratification of the contract under its terms as originally made. *Ib.*

20. *Master and servant. Instruction on good faith as defense to charge of wrongful hiring held erroneously refused.*

Where an employer of a laborer brings an action against another for wrongful hiring of the servant of the plaintiff before the end of his term of service, and where the evidence for the defense shows, or tends to prove, that the employer breached his contract by discharging members of the servant's family, whose service is embraced in the contract, it is error to refuse the defendant an instruction to the effect that if the servant told the defendant that he and members of his family had been discharged and that plaintiff had told servant to take his boy and go to the farm, and that the defendant, in good faith, believed such statements were true at the time of the hiring the jury should find for the defendant, even though such statements were not true in fact. *Ib.*

21. *Landlord and tenant. Stipulation for attorney's fee in rent note not enforceable in attachment for rent.*

Where a tenant gives a rent note which contains an agreement to pay an attorney's fee in case the note is not paid at maturity, and it is placed in the hands of an attorney, and where an attachment for rent is sued out, followed by replevin and trial in accordance with statutory proceedings, an attorney's fee cannot be allowed in such suit to the landlord. The statute giving the landlord a lien and providing for proceedings to enforce it does not include an attorney's fee, and the products grown by the tenant are not impressed with a lien for an attorney's fee, though stipulated for in the rent note, and

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APPEAL AND ERROR.

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## APPEAL AND ERROR—Continued.

the allowance of an attorney's fee in such case constitutes reversible error. *O'Keese et al. v. McLehmore*, 395.

22. *Bail.* If convicted person is ready to give bail on appeal, it is error to commit him to jail; violation of statute for protection of female children against insult bailable.

Under the provisions of chapter 217, Laws of 1916 (Hemingway's Code, sections 44, 45), any person convicted of a felony other than treason, murder, rape, arson, burglary, and robbery are entitled to bail pending appeal; and it is the duty of the trial court, on application therefor, to immediately fix the amount of bail required; and, if the person convicted is then and there ready to give adequate bail, it is error to order such person committed to jail. *Crosby v. State*, 33.

23. *Fraudulent conveyances.* Conduct of business by bankrupt's wife with husband as manager without sign on building held not a violation of the Sign Statute.

Where a shoe company sells to a customer a bill of shoes and such customer is adjudged a bankrupt and the trustee in bankruptcy sells the stock of goods, including the shoes, to a firm bidding thereon, for cash, and the money is paid, and such bidder then sells the stock of goods to the wife of the bankrupt, taking her notes therefor, and where she opens a business in her own name, in which business her husband is made manager, but who buys and sells in her name and pays out of her funds, no goods being bought on the husband's credit or with his means, the failure to have a sign on the building where the business is conducted does not make a case under the sign statute (section 4784, Code of 1906; Hemingway's Code, section 3128), and it is error under such facts to grant a peremptory instruction for the judgment creditor of the husband on the theory that the sign statute is applicable. *Rubenstein et al. v. Lynchburg Shoe Co.*, 528.

24. *Carriers.* Where verdict is excessive, appellate court may reverse and remand or affirm on remittitur; one thousand five hundred dollars held excessive for carrying child past destination, frightening it, and causing it to contract cold.

Where, on a trial for carrying a child of tender years beyond its destination in violation of a special contract, the verdict is grossly excessive, the court may reverse and remand the cause, or it may affirm on condition that plaintiff will enter a remittitur to a named amount, deemed sufficient by the appellate court. The evidence examined, and verdict in this case held excessive. *Yazoo & M. V. R. Co. v. O'Keefe*, 537.

## ATTACHMENT.

## APPEAL AND ERROR—Continued.

25. *Dismissal and nonsuit. Trial. Misjoinder of parties plaintiff cannot be urged on appeal unless notice given and misjoinder pleaded below; peremptory instruction against either party proper where evidence justifies it; plaintiff may take nonsuit at any time before verdict.*

Misjoinder of party plaintiffs in a suit cannot be taken advantage of on appeal unless notice was given and the misjoinder pleaded in the lower court. It is proper to grant a peremptory instruction against either party where the evidence justifies it. It is a legal privilege of a plaintiff to take a nonsuit in a case at any time before verdict. *Payne, Director General of Railroads, v. Stevens et al.*, 582.

26. *Taxation. Objection to assessment on ground of exemption precludes company from raising regularity of assessment on appeal.*

Objection to an assessment of a company on the ground that it is exempt from taxation precludes the company from raising the point on appeal that the assessment was not made as required by law in assessing corporations, nor can such point be raised where the record evidence fails to show that the company is a corporation. *Adams County v. National Box Co.*, 598.

27. *Supreme court may dismiss bill on affirming decree sustaining demurrer. When a decree sustaining a demurrer to a bill in equity is affirmed on an appeal to settle the principles of the case, and it does not appear that any amendment can be made to the bill of such character as to entitle the complainant to relief, the cause will not be remanded, but a final decree dismissing the bill will be rendered by the supreme court. Parker v. Board of Sup'rs of Grenada County*, 617.

28. *Decision by division not transferred to court in banc on suggestion of error.*

This court when working in divisions will not transfer a suggestion of error filed against an opinion decided by a division to the court in banc on motion of the litigant, but will use its own discretion as to whether it will do so. *Fraternal Aid Union v. Whitehead*, 661.

## ATTACHMENT.

1. *Garnishment Agent may attach property sold for commission, but cannot attach buyer's property for seller's debt; attachment fails where buyer was garnished after paying purchase money.*

Where an agent suing for commission depends on making a sale to give him a right to a commission, he may not attach or seize the property sold for the commission. He is not entitled, in such case, to attach the property of the buyer for the debt of the seller. And where a sale is made and the purchase money paid before garnishment is served, and where no property of the defendant is attached, save that

## ATTORNEY AND CLIENT—BAIL.

## ATTACHMENT—Continued.

sold by the agent, the attachment fails. *Slattery v. P. L. Renouet Lumber Co., Limited*, 229.

2. *Lien exists only when property seized; lien does not relate back to filing of bill.*

An attachment lien does not arise from the filing of a bill, but only exists when the property is seized. It does not relate back to the date of the filing of the bill, but dates from the seizure under the writ. *Ib.*

3. *Where property belonging to third persons is seized, they may intervene to cancel lis pendens notice.*

Where an attachment is sued out in the chancery court and property is seized, which belongs to third persons, and *lis pendens* notice is filed describing property not belonging to the defendant, but belonging to such third persons, such person may intervene in the suit to protect this property and to cancel *lis pendens* notice affecting such property or beclouding the title of such persons. *Ib.*

## ATTORNEY AND CLIENT.

*Landlord and Tenant. Stipulation for attorney's fee in rent note not enforceable in attachment for rent.*

Where a tenant gives a rent note which contains an agreement to pay an attorney's fee in case the note is not paid at maturity, and it is placed in the hands of an attorney, and where an attachment for rent is sued out, followed by replevin and trial in accordance with statutory proceedings, an attorney's fee cannot be allowed in such suit to the landlord. The statute giving the landlord a lien and providing for proceedings to enforce it does not include an attorney's fee, and the products grown by the tenant are not impressed with a lien for an attorney's fee, though stipulated for in the rent note, and the allowance of an attorney's fee in such case constitutes reversible error. *O'Keefe et al. v. McLemore*, 395.

## BAIL.

*If convicted person is ready to give bail on appeal, it is error to commit him to jail; violation of statute for protection of female children against insult bailable.*

Under the provisions of chapter 217, Laws of 1916 (Hemingway's Code, sections 44, 45), any person convicted of a felony other than treason, murder, rape, arson, burglary, and robbery are entitled to bail pending appeal; and it is the duty of the trial court, on application therefor, to immediately fix the amount of bail required; and, if the person convicted is then and there ready to give adequate bail, it is error to order such person committed to jail. *Crosby v. State*, 433.

## BAILMENT—BONDS.

## BAILMENT.

*Limitation on liability must be brought to owner's attention by bailee of baggage.*

Where baggage is checked by a company and the same is lost, the company is liable for its loss, and any contract limiting the liability of the company must be brought to the attention of the owner. *Van Noy Interstate Co. v. Tucker*, 260.

## BASTARDS.

*Instruction limiting consideration to intercourse by defendant held erroneous under evidence.*

In a bastardy case it is error to instruct the jury that the "sole and only question in this case is whether or not the defendant had intercourse with the prosecutrix at or near the proper time which in the course of nature would or might make him the father of her child," when there was evidence to support the theory that another man had probably had intercourse with the prosecutrix within the period of gestation. *Wilson v. Hendrix*, 273.

## BILLS AND NOTES.

*Indorser's name need not be noted as indorser on execution of judgment on note against maker and indorser who has also guaranteed payment.*

Where a judgment is rendered on a promissory note against the maker and an indorser who has also guaranteed the payment of the note, the indorser is not within the requirement of section 4015, Code of 1906, Hemingway's Code, section 2577, that "The clerk or justice of the peace shall indorse on all executions issued on judgments rendered in suits on promissory notes and bills of exchange the names of the makers, drawers, acceptors, and indorsers, so as to designate the order in which they are liable," etc. *Quinn v. Alexander et al.*, 690.

## BONDS.

1. *Appeal and error. Amount of supersedeas bond on appeal from decree of sale to satisfy lien stated.*

Where a court decrees a sale of real estate to satisfy a lien established by the court to obtain an appeal with supersedeas, a bond is required in double the value of the property ordered sold, or in double the judgment rendered against the property taking whichever is the smallest as a basis for the bond. *Beekman et al. v. Bost*, 77.

2. *Officers. Bond of officer binding on every person who subscribes it.*

A bond, delivered and approved as a bond of a public officer required by law in order that he may hold and receive the emoluments of the office, is binding on every person who subscribes it under the pro-

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BONDS.

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## BONDS—Continued.

visions of section 3463, Code of 1906 (section 2801, Hemingway's Code), although the office is erroneously described therein. *State ex rel. v. Hundley et al.*, 355.

3. *Officers. Bond of officer security for duties subsequently imposed on him.*

The bond of a public officer is a security, not only for the performance of the duties incumbent on him when the bond was executed, but for such other duties, not different in kind, which the legislature may thereafter impose on him. *Ib.*

4. *Counties. Loss through issuance by treasurer of receipt for moneys derived from bonds before it came into his possession covered by bond.*

It is the duty of a county treasurer not to issue a receipt for money derived from the sale of county bonds until the money has come into his possession, and any loss resulting to the county because of the issuance by the treasurer of such a receipt before actually receiving the money is covered by his official bond. *Ib.*

5. *Counties. Treasurer's bond security for purchase money of bonds prematurely receipted for.*

Where a treasurer of a county enables a bank to receive the purchase money of bonds sold by the bank for the county by delivering to the bank his receipt for the money to be delivered by it to the purchaser of the bonds, and fails to collect such money from the bank and turn it over to his successor in office, his official bond is security therefor, although his successor could have himself collected the money from the bank. *Ib.*

6. *Judgment. Adjudication of United States Circuit Court of Appeals on surety's liability under appeal bond res adjudicata as against further recovery in state court.*

Where an appeal bond has been executed under an order of a judge of the United States district court, in a cause there pending, granting a writ of error to the United States circuit court of appeals, and thereafter the United States circuit court of appeals has proceeded to judgment on the bond, and has expressly adjudicated the extent of the liability of the surety on the bond, the judgment of such appellate court is *res adjudicata* of all further liability on the bond, and an additional award against the surety thereon cannot be recovered in a state court. *National Surety Co. v. Lee*, 517.

7. *Principal and surety. Employer bound to report only facts justifying charge of larceny or embezzlement under indemnity bond.*

Where a surety company has executed a bond indemnifying an em-

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BRIDGES—BROKERS.

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## BONDS—Continued.

ployer against loss by reason of any act of an employee constituting larceny or embezzlement, under a provision of the bond requiring the employer to give written notice to the company immediately upon becoming aware of any loss which might be made the basis of a claim thereunder, the employer is not bound to report his suspicions arising from unexplained irregularities or discrepancies in the books or accounts of the employee, but notice is only required after the employer has knowledge of such facts as would justify the charge of larceny or embezzlement. *Maryland Casualty Co. v. Hall*, 792.

8. *Principal and surety. Surety under indemnity bond not liable for sums owing to employer by employee discharged for improper use of employer's other funds.*

Under an employer's indemnity bond, providing that the company shall not be liable thereunder for any sum owing to the employer by the employee at the commencement of the term of the bond, or for any money thereafter used directly or indirectly by the employee to discharge in whole or in part any debt or obligation contracted or incurred by the employee with the employer before or during the term of the bond, the surety company is not liable for any sum which was owing to the employer at the commencement of the bond, and which the employee attempted to discharge by the improper use of other funds of the employer. *Ib.*

## BRIDGES.

*Supervisors' failure to use certain fund held not to invest highway commissioners or taxpayers with right to recover money paid from special fund.*

The failure of a board of supervisors to comply with the provision of chapter 176, Laws of 1914 (Hemingway's Code, section 7177), that "it shall be the duty of the board of supervisors out of the county fund to build all bridges in districts coming under this act the cost of which exceeds twenty-five dollars, and to keep the same in repair," does not invest either the highway commissioners or a taxpayer with the right to sue for and recover from the county the amount of money paid by the board for such bridges out of the special fund derived from the sale of bonds issued or taxes levied under the statute. *Shell et al., Com'rs., v. Monroe County*, 563.

## BROKERS.

1. *Commission not recoverable from third person on exchange of land without contract, unless relation disclosed.*

Where a real estate agent advertised certain property for sale, from which advertisement a correspondence ensued between the agent and

## CANCELLATION OF INSTRUMENTS.

## BROKERS—Continued.

a third party, finally resulting in an exchange of lands between the agent's client or customer and the third party, the agent cannot recover a commission of the third party without an express contract, unless he discloses to the third party his relation to the other party. *G. D. Hook & Co. v. Miller*, 1.

2. *Expenses incurred by owner's authority in canceling leases, recoverable, though no commission allowed.*

While no commissions are recoverable by a broker, where they are based on the amount received for the land by the owner, and the sale has failed through no fault of the owner, the broker may nevertheless recover expenses incurred by the owner's authority in securing options to cancel leases to enable the owner to deliver possession to the prospective buyer. *Lee v. Green Wood Agency Co.*, 177.

3. *When broker knows of defect in title, undertaking is to sell what owner has; owner bound to disclose facts which would clear title.*

Where a real estate agent undertakes to make a sale of a piece of property knowing that title is defective, he undertakes, in effect, to sell what the owner has, provided the defect is such as cannot with reasonable effort be overcome by the owner. In such case it is the duty of the owner to make reasonable effort to perfect the title, and, if that may be done by disclosing facts within his knowledge that might remove the difficulty and he fails to do so, the owner cannot escape the payment of fees or commissions earned by the agent in bringing buyer and seller together on terms agreed on. *Shireman et al. v. Wildberger, et al.*, 199.

4. *Broker producing purchaser ready, willing and able to buy on specified terms, entitled to commission.*

Where a contract between a broker and his principal specifies the terms upon which the land is to be sold, the broker has performed his duty and is entitled to his commissions when he produces a purchaser, ready, able, and willing to buy the lands upon the specified terms. *Jenny v. Smith-Powell Realty Co.*, 608.

## CANCELLATION OF INSTRUMENTS.

*Petition held insufficient to state grounds for cancellation of corporation's deed to its secretary.*

A bill in equity by the grantor in a deed against the grantee to set aside and cancel such deed as a cloud upon the grantor's title, the grantor being a corporation, which alleges as grounds for cancellation of such deed that the consideration therein mentioned is "feigned and fictitious;" that the grantee in the deed was the secretary of the

## CARRIERS.

## CANCELLATION OF INSTRUMENTS—Continued.

grantor corporation, and joined in the execution of the deed to himself, together with the president of the corporation; that the deed was not legally acknowledged by the president of the corporation—states no grounds for cancellation of such deed. *Mexican Gulf Land Co. v. Globe Trust Co., et al.*, 862.

## CARRIERS.

1. *Carrier not required to accept unattended child of tender years, but, if it does so, is liable for neglect of duty; if carrier seeks to limit ticket agent's power to contract, limitations must be posted or brought to passenger's attention.*

The carrier of passengers is not required to accept, unattended, a child of tender years needing special attention, but it may do so, and, if it does, it is liable for injury caused by its neglect of duty. The ticket agent generally has power to make contracts for the carrier for the carriage of passengers, and such contracts are within the scope of his apparent duties. If the carrier seeks to limit his powers, it must have its rules limiting the agent's power posted in its passenger depots, or else it must call the passenger's attention to the limitation, or bring it to his attention, to prevent liability for breach of a special contract by its ticket agent. *Yazoo & M. V. R. Co. v. O'Keefe*, 536.

2. *Instructions as to liability for carrying child past destination in violation of special contract held not erroneous.*

In a suit for damages for failure to put a child off at its destination, under a special contract so to do, to instruct the jury that, if the jury believed the ticket agent agreed that the conductor would put the child off at its destination, and that the conductor promised the same thing, and if they believed that it was within the scope of the authority of these employees to bind the railroad company by an agreement or promise made by the conductor and ticket agent, that then the defendant would be liable for the conductor's failure to put the child off, is not erroneous, where the evidence sustains such facts. The fact that the conductor was without authority to make a special contract would be immaterial, where the ticket agent had such power and did make such contract. It merely imposed on the plaintiff the necessity of proving more than was needed under the law, it being sufficient to prove that the ticket agent had power to and did make such contract, and that the carrier breached its duty thereunder. *Ib.*

3. *Appeal and error. Where verdict is excessive, appellate court may reverse and remand or affirm on remittitur; one thousand five hun-*

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 CARRIERS.
 

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## CARRIERS—Continued.

*dred dollars held excessive for carrying child past destination, frightening it, and causing it to contract cold.*

Where, on a trial for carrying a child of tender years beyond its destination in violation of a special contract, the verdict is grossly excessive, the court may reverse and remand the cause, or it may affirm on condition that plaintiff will enter a *remittitur* to a named amount, deemed sufficient by the appellate court. The evidence examined, and verdict in this case *held excessive*. *Yazoo & M. V. R. Co. v. O'Keefe*, 536.

4. *White passenger compelled to ride with negroes in coach designated for white persons may recover.*

Under our separate coach law (section 4059, Code of 1906; section 6687, Hemingway's Code), a white passenger who, after notice and objection to the conductor, is compelled to ride in a compartment with negroes, in a coach designated for white persons, may recover damages from the railroad for violation of the statute; and this is true even though there were other coaches on the train for white persons, and the sign designating the coach had been changed by some outside agency. *Payne, Director General of Railroads v. Stevens, et al.*, 582.

5. *Initial carrier's liability ends on delivery to interstate point designated in its bill of lading.*

When the initial carrier issues the bill of lading, by the terms of which it undertakes to deliver the interstate shipment at a certain place, its contract is performed when it delivers the shipment in good order at the designated place, and it is not liable, under the Carmack Amendment (U. S. Comp. St., sections 8604-a, 8604-aa), for damage to the shipment while it is being transported by another railroad company to some other point under a bill of lading issued by the other company to the owner of the property. *Yazoo & M. V. R. Co. v. Norman*, 636.

6. *May contract to carry articles though no tariff rate filed; liable for loss of jewelry though no tariff rate filed; "Public highways;" "Common carriers."*

Under section 184 of the state Constitution of 1890, and under section 4839, Code of 1906 (section 7624, Hemingway's Code), railroads are common carriers and public highways over which persons have a right to ship articles not dangerous to persons or other property; and a railroad may contract to carry articles though it has filed no tariff rate with the State Commission, and where it accepts jewelry and other articles of special value it is liable for their loss resulting from

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 CHARITIES—CODE CITED AND CONSTRUED.
 

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## CARRIERS—Continued.

dishonesty or negligence of its employees. *Illinois Cent. R. Co. v. King*, 734.

7. *Agent's failure to specify all articles in bill of lading held waiver of nonliability cause.*

Where a shipper carrier articles of freight to a freight agent of a railroad company in charge of its business, and discloses the nature and value of the articles to be shipped by freight, and such agent writes only one article in the bill of lading when the shipment contains many articles, the company cannot-escape responsibility for the negligence or dishonesty of its employees because the bill of lading contains a clause that "no carrier will be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariff, unless a special agreement to do so and the stipulated value of the articles are indorsed hereon." Where the information is furnished the agent in charge, and he fails to write the data on the bill of lading, it must be treated as having waived the provision. *Ib.*

## CHARITIES.

*Bill held to show complainant had no right to enforce alleged trust.*

Where a bill in chancery to enforce an alleged trust shows that the trust, if any exist, is for the benefit of a named school, and is not brought in the name of the school, or by its trustees, but by parties living in the community who made some contributions to a fund to buy the alleged trust property for the use of the school, there is no such right in the complainant as will warrant equity in taking cognizance of the suit and rendering a decree, and where such bill is demurred to the demurrer ought to be sustained. *Freedman's Aid & Southern Education Soc. v. Scott*, 299.

## CODE CITED AND CONSTRUED.

- § 383 (Hem.). Costs. No attorney's fee held allowable for defending judgment in injunction suit on appeal. *Smith v. Perkins et al.*, 203.
- §§ 502, 503 (Hem.). Master and servant. Negligence as to employee boarding car with defective step and his contributory negligence held for jury. *Tallahala Lumber Co. v. Holliman*, 308.
- § 623 (1906). Costs. No attorney's fee held allowable for defending judgment in injunction suit on appeal. *Smith v. Perkins et al.*, 203.
- § 981 (Hem.). Criminal law. Larceny. Instruction omitting element of felonious or fraudulent taking error. *Dedeaux v. State*, 326.

## CODE CITED AND CONSTRUED.

## CODE CITED AND CONSTRUED—Continued.

- § 1251 (1906). Criminal law. Larceny. Instruction omitting element of felonious or fraudulent taking error. *Dedeaux v. State*, 326.
- § 1415 (Hem.). Divorce. Chancery court may allow such alimony as is equitable and just with regard to circumstances. Husband not in contempt for failure to obtain sureties, when he is unable to do so. *Ramsay v. Ramsay*, 185.
- § 1645 (Hem.). Trial. Party suing for blocking of crossing cannot testify to length of blocking in rebuttal. *Mock v. Hines*, 111.
- § 1645 (Hem.). Railroads. Burden imposed by prima facie statute. *Bonds v. Mobile & O. R. Co.*, 547.
- § 1673 (1906). Divorce. Husband not in contempt for failure to obtain sureties, when he is unable to do so. Chancery court may allow such alimony as is equitable and just with regard to circumstances. *Ramsay v. Ramsay*, 185.
- § 1789 (Hem.). Executors and administrators. Statutory requirement that executor file vouchers for disbursements for annual accounts mandatory. *Ridgeway et al. v. Jones*, 22.
- § 1918 (1906). Criminal Law. Refused to instruct that accused's failure to testify should not operate to his prejudice held error. *Funches v. State*, 140.
- § 1985 (1906). Trial. Party suing for blocking of crossing cannot testify to length of blocking in rebuttal. *Mock v. Hines, Director General*, 111.
- § 1985 (1906). Railroads. Burden imposed by prima facie statute. *Bonds v. Mobile & O. R. Co.*, 547.
- § 2086 (Hem.). Criminal law. Evidence insufficient to show conviction of prior offenses under statute. *Williams v. State*, 347.
- § 2121 (1906). Executors and Administrators. Statutory requirement that executor file vouchers for disbursements for annual accounts mandatory. *Ridgeway et al. v. Jones*, 22.
- §§ 2199, 2211, 2700 (Hem.). Grand jury. Circuit court may during term reassemble grand jury after discharge when 15 or more of the original members respond. *Kysar v. State*, 79.
- § 2222 (1906). Animals. Statute imposes absolute liability on owner of trespassing stock. *Minor v. Dockery*, 727.
- § 2270 (Hem.). Corporations. Corporate deed executed by secretary to himself as grantee not void, where president also joined. *Mexican Gulf Land Co. v. Globe Trust Co. et al.*, 862.
- § 2434 (Hem.). Highways. Balance due contractor not subject to lien under statute by filing claim with board of supervisors. *McGraw v. Board of Sup'rs.*, 420.
- § 2491 (Hem.). Insurance. New limitation as to time for suit held void. *Sov. Camp W. O. W. v. Miller*, 503.

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 CODE CITED AND CONSTRUED.
 

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## CODE CITED AND CONSTRUED—Continued.

- § 2314 (Hem.). Appeal and error. Judgment, establishing lost record, from which appeal with supersedeas pending, not admissible in another suit as evidence. *Belsoni Land Co. v. Robertson*, 338.
- § 2577 (Hem.). Bills and notes. Indorser's name need not be noted as indorser on execution of judgment on note against maker and indorser who has also guaranteed payment. *Quinn v. Alexander et al.*, 690.
- § 2615 (1906). Insurance. Delivery of policy by agent in violation of instructions to secure medical certificates held act of insurer. *Mutual Life Ins. Co. v. Vaughan*, 369.
- § 2636 (1906). Insurance. Fraternal benefit societies not governed by general law as to filing constitution, etc. *Sovereign Camp, W. O. W. v. Garner*, 8.
- §§ 2700, 2706, 2718 (1906). Grand jury. Circuit court may during term reassemble grand jury after discharge when 15 or more of the original members responds. *Kysar v. State*, 79.
- § 2766 (1906). Corporations. Corporate deed executed by secretary to himself as grantee not void, where president also joined. *Mexican Gulf Land Co. v. Globe Trust Co. et al.*, 862.
- § 2891 (Hem.). Officers. Bond of officer binding on every person who subscribed it. *State ex rel v. Hundley et al.*, 355.
- § 2911 (Hem.). Subrogation. A surety paying a judgment has all the equities of the judgment creditor. *Quinn v. Alexander, et al.*, 690.
- § 3074 (1906). Highways. Balance due contractor not subject to lien under statute by filing claim with board of supervisors. *McGraw v. Board of Sup'rs*, 420.
- § 3127 (1906). Insurance. New limitation as to time for suit held void. *Sov. Camp, W. O. W. v. Miller*, 503.
- § 3128 (Hem.). Fraudulent conveyances. Conduct of business by bankrupt's wife with husband as manager without sign on building held not a violation of the Sign Statute. *Rubenstein et al. v. Lynchburg Shoe Co.*, 528.
- §§ 3173, 3186 (1906). Appeal and error. Judgment, establishing lost record, from which appeal with supersedeas pending, not admissible in another suit as evidence. Supreme Court judge has power to grant appeals with supersedeas from judgment establishing lost record. *Belsoni Land Co. v. Robertson*, 338.
- §§ 3308, 3311 (1906). Municipal corporations. New census may be ordered by Governor to reclassify municipalities only when returns show change in classification. *State ex rel v. Metts*, 819.
- § 3375 (Hem.). Descent and distribution. Husband, not provided for in

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CODE CITED AND CONSTRUED.

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## CODE CITED AND CONSTRUED—Continued.

- will, held entitled to undivided one-half interest in homestead lands devised by wife. *Cain et al. v. Barnwell*, 123.
- § 3463 (1906). Officers. Bond of officer binding on every person who subscribes it. *State ex rel v. Hundley et al.*, 355.
- § 3735 (1906). Subrogation. A surety paying a judgment has all the equities of the judgment creditor. *Quinn v. Alexander*, 690.
- § 3874 (1906). Street railroads. Street railroad distinguished from commercial railroad for imposition of privilege tax. *Gulfport & M. C. Traction Co. v. City of Biloxi*, 626.
- § 4015 (1906). Bills and Notes. Indorser's name need not be noted as indorser on execution of judgment on note against maker and indorser who has also guaranteed payment. *Quinn v. Alexander et al.*, 690.
- § 4059 (1906). Carriers. White passenger compelled to ride with negroes in coach designated for white persons may recover. *Payna v. Stevens et al.*, 582.
- § 4445 (Hem.). Bail. If convicted person is ready to give bail on appeal, it is error to commit him to jail; violation of statute for protection of female children against insult bailable. *Crosby v. State*, 433.
- § 4541 (Hem.). Animals. Statute imposes absolute liability on owner of trespassing stock. *Minor v. Dockery*, 727.
- § 4784 (1906). Fraudulent conveyances. Conduct of business by bankrupt's wife with husband as manager without sign on building held not a violation of the Sign Statute. *Rubenstein et al. v. Lynchburg Shoe Co.*, 528.
- § 4839 (1906). Carriers. May contract to carry articles though no tariff rate filed; liable for loss of jewelry though no tariff rate filed; Public highways;" "Common carriers." *Illinois Cent. R. Co. v. King*, 734.
- § 4908 (1906). Appeal and error. Supreme Court judge has power to grant appeals with supersedeas from judgment establishing lost record. *Belzoni Land Co. v. Robertson*, 338.
- § 5078 (Hem.). Insurance. Delivery of policy by agent in violation of instructions to secure medical certificates held act of insurer. *Mutual Life Ins. Co. v. Vaughan*, 369.
- § 5087 (1906). Descent and Distribution. Husband, not provided for in will, held entitled to undivided one-half interest in homestead lands devised by wife. *Cain et al. v. Barnwell*, 123.
- § 5102 (Hem.). Insurance. Fraternal benefit societies not governed by general law as to filing constitution, etc. *Sovereign-Camp, W. O. W. v. Garner*, 8.

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 COMMERCE.
 

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## CODE CITED AND CONSTRUED—Continued.

- § 5804, 5808 (Hem.). Municipal corporations. New census may be ordered by Governor to reclassify municipalities only when returns show change in classification. *State ex rel. v. Metts*, 819.
- §§ 5941 to 5965 (Hem.). Municipal corporations. Property owner held liable for interest on legal item of assessment from time assessment made final. *Buckley et al. v. City of Jackson*, 780.
- § 6687 (Hem.). Carriers. White passenger compelled to ride with negroes in coach designated for white persons may recover. *Payne v. Stevens et al.*, 582.
- §§ 6878, 6879 (Hem.). Taxation. Exemption of factories includes property, necessary to operation only; "manufacturing plant." Exemption statutes strictly construed against exemptions; exemption statute construed; raw materials and finished products not part of factory exempted. *Adams County v. National Box Co.*, 598.
- § 7162 (Hem.). Highways. Commissioners have no authority to let contracts until engineer's survey and estimate adopted and ratified. *Ellis et al v. Ullman et al.*, 678.
- §§ 7158, 7177 (Hem.). Highways. Highway commissioners held to have no control over funds derived under statute. Bridges. Supervisors' failure to use certain fund held not to invest highway commissioners or taxpayers with right to recover money paid from special fund. *Shell et al., Com'rs v. Monroe Co.*, 562.
- § 7624 (Hem.). Carriers. May contract to carry articles though no tariff rate filed; liable for loss of jewelry though no tariff rate filed; "Public highways;" "Common carriers." *Illinois Cent. R. Co. v. King*, 734.

## COMMERCE.

*Rule for determining applicability of federal Employers' Liability Act stated; federal Employers' Liability Act held inapplicable to action for assault upon railroad employee by engineer.*

When applicability of the federal Employers' Liability Act (U. S. Comp. St., sections 8657-8665) is involved, or it is to be determined in a suit whether it is applicable or not, it may generally be determined by inquiring whether at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as, practically, to be a part of it. The facts in this case do not bring it within this rule as the cars being switched neither carried interstate commerce nor were they to be used immediately in interstate commerce, nor had they been used immediately before in such commerce, but were only used therein whenever the exigencies of the railroad called them into service for that purpose. *Hines, Agent v. Green*, 477.

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 CONSTITUTION CITED AND CONSTRUED.
 

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- § 165 (1890). Judges. Relationship to attorney not a disqualification; suggestion of disqualification must be made before trial unless knowledge acquired subsequently. *Shireman et al. v. Wildberger et al.*, 499.
- § 184 (1890). Adverse possession. Title may be obtained to part of railroad right of way not necessary to business as common carrier. *Mobile & O. R. Co. v. Strain*, 697.
- § 184 (1890) Carriers. May contract to carry articles though no tariff rate filed; liable for loss of Jewelry though no tariff rate filed; "Public highway;" "Common Carriers." *Illinois Cent. R. Co. v. King*, 734.
- § 211 (1890). Railroads. Effect of consolidation on right of way over school section stated. *Yazoo & M. Y. R. Co. v. Sunflower County*, 92.

## CONSTRUCTION OF INSTRUMENTS.

1. *Insurance. Constitution of benefit society that no officer or agent might alter, modify, or waive provisions held void.*

A provision in the constitution and by-laws of a benefit society that "no officer or member of the supreme lodge, except the supreme president by dispensation, nor any local or subordinate lodge or any officers or member thereof, or any organizer, deputy, or agent, shall have authority to change, alter, modify, or waive any of the provisions of this constitution," is void because a corporation, society, or individual cannot repeal the law of estoppel and waiver, and because said provision does not leave any officer or agent of the society who may act for it so as to bind it as to these subjects. *London Guarantee & Accident Co. v. M. C. Railroad Co.*, 97 Miss. 165, 52 So. 787. *Fraternal Aid Union v. Whitehead*, 153.

2. *Insurance. Representations in application not warranties when made on explanation of manager of society.*

Where a state manager of a benefit society whose powers are not limited by the by-laws of the society makes out an application for an applicant for a benefit certificate, and writes the answers to questions propounded to the applicant and interprets the meaning of such questions and writes answers after having the full facts explained to him by the applicant, the answers will not be held warranties so as to avoid the certificate issued thereon, even though not literally true. If they are not false, considered in the light of the facts made known to the agent, or if not false in the light of his explanations of the meaning and purpose of the questions asked, they will not avoid the policy or certificate. *Ib.*

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CONTEMPT.

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## CONSTRUCTION OF INSTRUMENTS—Continued.

3. *Insurance. Certificate provision that member's contract is governed by laws of society is binding if change made thereby is reasonable and before benefit becomes payable.*

A provision in an insurance certificate that the contract is governed by the laws of the society then in force or adopted thereafter is valid and binding upon the beneficiary, provided subsequent changes of contract are reasonable and made before benefit accrues. *Sovereign Camp, W. O. W. v. Miller*, 502.

4. *Insurance. New limitation as to time for suit held void.*

Where a life insurance contract in a fraternal order is governed by the laws of the order then or afterwards adopted, the adoption in 1913 of a new constitution and Code of laws by the order superseded all previous constitutions and laws, and a provision therein limiting the right to commence suit within one year from death of insured was prohibited by section 3127, Code of 1906 (*Hemingway's Code*, section 2491) and is void. *Ib.*

5. *Insurance. Company held under no obligation to apply reverse on lapsed policy to extension thereof, in absence of demand.*

Under section 88, chapter 690, of the 1892 Session Laws of New York, an insurance company is under no obligation to apply the reserve on a lapsed life insurance policy to the extension of the policy, unless a demand therefor is made on the company within six months after the lapsing of the policy. *Mutual Life Mo. Co. v. Batson*, 789.

## CONSTRUCTIVE NOTICE.

See ACKNOWLEDGMENT.

## CONTEMPT.

1. *Divorce. Husband's failure to pay alimony under decree prima-facie evidence of contempt.*

The failure of the husband to comply with the decree providing for the payment of alimony is prima-facie evidence of contempt, to purge which the burden is upon him to prove his inability to pay. *Ramsay v. Ramsay*, 185.

2. *Divorce. Husband should not be committed; when he can pay alimony only of future earnings.*

A husband should not be committed to prison until he pays the arrears of alimony allowed to the wife, when he has no property and can pay the alimony only out of his future earnings. *Ib.*

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CONTRACTS.

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## CONTEMPT—Continued.

3. *Divorce. Husband not in contempt for failure to obtain sureties, when he is unable to do so.*

Under section 1673, Code of 1906 (section 1415, Hemingway's Code), the court may, "if need be, require sureties for the payment of the sum so allowed" to the wife as alimony; but, when the giving of such sureties is ordered, the husband is not in contempt until he fails to obey the order, and not then if his failure to obey the order resulted solely from his inability to do so. *Ramsay v. Ramsay*, 185.

4. *Witnesses. Rights of defendant in contempt proceedings stated.*

In a proceeding for contempt prosecuted for the purpose of punishing an alleged contemner for disobeying an order or decree of the court, he is entitled to be informed by the petition, motion, or information by which the proceeding was begun of the nature and cause of the accusation, cannot be compelled to testify against himself, and should be presumed innocent until proved guilty beyond a reasonable doubt. *Ramsay v. Ramsay*, 715.

5. *Punitive sentence for disobedience improper in proceedings to compel obedience.*

A punitive sentence appropriate only in a proceeding to punish for disobedience of an order or decree of the court cannot be imposed in a proceeding prosecuted to compel obedience to an order or decree made to enforce the rights of a party to the suit. *Ib.*

6. *Punitive sentence may be imposed only after opportunity to defend.*

A punitive sentence in a proceeding for contempt can be imposed only after the contemner has been given an opportunity to appear and defend his alleged disobedience of an order or decree of the court. *Ib.*

## CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

## CONTRACTS.

1. *Brokers. Commission not recoverable from third person on exchange of land without contract, unless relation disclosed.*

Where a real estate agent advertised certain property for sale, from which advertisement a correspondence ensued between the agent and a third party, finally resulting in an exchange of lands between the agent's client or customer and the third party, and agent cannot recover a commission of the third party without an express contract, unless he discloses to the third party his relation to the other party. *Hook & Co. v. Miller*, 1.

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CONTRACTS.

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## CONTRACTS—Continued.

2. *Corporations. Evidence of contract with president insufficient to show contract of sale by corporation, in absence of showing that he contracted for it.*

In a suit against a corporation upon a contract of sale, the evidence must show with reasonable certainty that the contract was made with the corporation. Showing a contract with the president of the corporation is not enough. There must be some evidence tending to prove that the president of the corporation was contracting for the corporation. *Brownlee Lumber Co. v. Gaudy*, 71.

3. *Courts will not grant relief on illegal contract when parties in pari delicto.*

When an action is based upon a contract which is in violation of the laws of the state, and the parties to the action are *in pari delicto*, our courts will not entertain a suit for the relief of either against the other, but will leave them in their respective conditions. *Lowenburg v. Klein*, 284.

4. *Injunction. Attorney's fees not allowable on dissolution of injunction to enforce illegal agreement.*

Since the courts will not grant relief to either party to an illegal contract, when a suit for injunction is based upon an illegal agreement, and the parties thereto are *in pari delicto*, attorney's fees should not be allowed to the defendant upon the dissolution of the injunction. *Ib.*

5. *Insurance. Acknowledgment of receipt of premium in policy held conclusive against insurer in favor of beneficiary.*

Where an insurance policy recited on its face, "In consideration of the annual premium of Fifty and 10/100 dollars, the receipt of which is hereby acknowledged," such recital is more than a mere receipt; it is contractual, and is conclusive against the company in favor of the beneficiary so far as liability depends upon payment of the premium is concerned. It does not prevent the company from holding the insurer liable for the payment of the premium. The rule is that, as between the insured and the insurer for the purpose of collecting the premium, it is not conclusive but only *prima-facie* evidence of payment; but as between the beneficiary and the insurer it is conclusive, being contractual. *Mutual Life Ins. Co. v. Vaughan*, 370.

6. *Sunday. Sunday contract void, but recovery may be had for quantum valebat where property accepted on subsequent secular day.*

A written contract executed on Sunday is void, and no recovery can be had thereon, but recovery may be had for *quantum valebat* in an action of *assumpsit* upon an implied promise to pay for property

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 CONTRACTS.
 

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## • CONTRACTS—Continued.

which was accepted and converted upon a subsequent secular day.  
*A. Goletti, Inc. v. Andrew Gray Co.*, 646.

7. *Evidence. Plans and specifications under building contract admissible, though not signed.*

Where the contract is to build according to certain plans and specifications, and the building is constructed under them, as originally drawn or as modified, they are admissible in evidence in a suit by the contractor against the owner to recover a balance due on the contract, even though not signed by the parties for identification purposes, as stipulated in the contract; acting under them being a waiver of signing. *Bernstein v. Angelletty*, 656.

8. *Highways. Commissioners have no authority to let contracts until engineer's survey and estimate adopted and ratified.*

The provisions of section 5, chapter 176, Laws of 1914 (Hemingway's Code, section 7162), providing for the appointment of road commissioners and requiring them to employ a competent engineer to survey and lay out such road or roads as should be selected by such commissioners to be constructed and maintained, and making it the duty of such engineer to make an estimate of the cost of constructing and maintaining such highway for each separate mile covered by such survey, and to report the survey and estimate to the commissioners before contracts are let for the construction, or the construction and maintenance of such roads, are mandatory, and until such surveys and estimate have been filed and adopted by the commissioners and ratified by the board of supervisors, the commissioners are without authority to let contracts for the construction for such roads. *Ellis et al. v. Tillman et al.*, 678.

9. *Logs and logging. Timber held to revert to vendors upon impossibility of performance of contract.*

In a timber contract providing that, if at any time it becomes impossible for vendees to cut the timber, it would revert to vendor, the contract becomes invalid, and the reversion arises when it appears that it was impossible for vendees' assignee to cut the timber within a reasonable time, in the manner stipulated. *Adams v. Young et al.*, 748.

10. *Frauds, statutes of. Verbal lease, constituting completed contract, held not unenforceable under statute.*

A lessee, who has entered into possession of land under a verbal lease which was not to be performed within one year and has completed the contract, is liable for the rent; and when a lessor has exercised a contractual right to terminate a verbal lease at the end of a

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 CORPORATIONS.
 

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## CONTRACTS—Continued.

yearly period, this constitutes the lease a completed contract, and the mere failure to discharge mutual monetary obligations on a verbal contract otherwise completed does not render such contract unenforceable under the statute of frauds. *Franklin v. Berry*, 763.

## CORPORATIONS.

1. *Evidence of contract with president insufficient to show contract of sale by corporation, in absence of showing that he contracted for it.*  
In a suit against a corporation upon a contract of sale, the evidence must show with reasonable certainty that the contract was made with the corporation. Showing a contract with the president of the corporation is not enough. There must be some evidence tending to prove that the president of the corporation was contracting for the corporation. *Brownlee Lumber Co. v. Gaudy*, 71.

2. *Street railroads. Street railroad distinguished from commercial railroad for imposition of privilege tax.*

Under section 3874, Code of 1906, as amended by Acts 1920, chapter 104, section 60, which reads as follows: "On each individual, firm or corporation operating a street or interurban car line, on each mile or fraction thereof, thirty dollars—held, on the evidence introduced in the case, that the Gulfport & Mississippi Coast Traction Company is a street railroad corporation operating a street or interurban car line, and is not a commercial railroad which could be classified as a third class railroad by the State Railroad Commission, and the city assessment of fifteen dollars per mile on the line in the city is valid under the law. *Gulfport & M. C. Traction Co. v. City of Biloxi*, 626.

3. *Corporation may use own as it will, if it does not injure others.*  
A corporation, as well as an individual landowner, within its charter powers, has the right to so use its own as it will, qualified by the duty to so use it as not to injure others, if that be reasonably within its power. *Moore v. Swamp Dredging Co.*, 843.
4. *Corporate deed executed by secretary to himself as grantee not void, where president also joined.*

The fact that a deed from a corporation to an individual to land was executed on the part of the corporation by its secretary, who was also grantee in the deed, does not render the conveyance void, where the president of the corporation also joined in the execution of the deed, under section 2766, Code of 1906 (section 2270, Hemingway's Code), which provides, among other things, that a corporation may convey its land under the corporate seal and the signature of an officer. *Mexican Gulf Land Co. v. Globe Trust Co.*, 862.

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COSTS—COUNTIES.

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## COSTS.

*No attorney's fee held allowable for defending judgment in injunction suit on appeal.*

Where an injunction is sued out to restrain sales of property under mortgages, deeds of trusts, or judgments, the 5 per cent. damages allowed under the provision of section 623, Code of 1906, (section 383, Hemingway's Code), for the dissolution of such injunction includes all damages, and no more can be recovered, and this is true even though there is an appeal to the Supreme Court from the judgment dissolving the injunction, and, consequently, where the 5 per cent. damage has been recovered in the court below, no attorney's fee will be allowed here for defending the judgment on appeal. *Smith v. Perkins, et al.*, 203.

## COUNTIES.

1. *Loss through issuance by treasurer of receipt for moneys derived from bonds before it came into his possession covered by bond.*

It is the duty of a county treasurer not to issue a receipt for money derived from the sale of county bonds until the money has come into his possession, and any loss resulting to the county because of the issuance by the treasurer of such a receipt before actually receiving the money is covered by his official bond. *State ex rel. v. Hundley et al.*, 356.

2. *Treasurer's bond security for purchase money of bonds prematurely receipted for.*

Where a treasurer of a county enables a bank to receive the purchase money of bonds sold by the bank for the county by delivering to the bank his receipt for the money to be delivered by it to the purchaser of the bonds, and fails to collect such money from the bank and turn it over to his successor in office, his official bond is security therefor, although his successor could have himself collected the money from the bank. *Ib.*

3. *Validity of bond issue cannot be questioned after validation under statute, although issued without authority.*

The validity of bonds issued by a county, municipality, or district is conclusive, and cannot be questioned after they have been confirmed and validated under the provisions of chapter 28, Laws Ex. Sess. 1917, although the county, municipality, or district issuing them was without authority so to do. *Parker v. Board of Sup'rs of Grenada County*, 617.

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COURTS—CRIMINAL LAW.

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## COURTS.

1. *Act fixing term of chancery court held not repealed.*  
The provision of chapter 262, Laws 1916, that the chancery court of George county shall convene on the fourth Monday of January and continue in session six days, was not repealed by chapter 257, Laws 1916. *Weaver v. Turner*, 250.
2. *Criminal law. Minutes of circuit court cannot be contradicted by parol; supreme court orders and judgments shown by minutes.*  
The circuit court speaks through its minutes. These court minutes import absolute verity and cannot be contradicted by parol. The orders and judgment of this court are shown on its minutes. *Williams v. State*, 347.

## CRIMINAL LAW.

1. *Instruction assuming that witness testified to material fact in dispute erroneous.*  
An instruction is erroneous that assumes and in effect charges the jury that a witness testified to a material fact which is in dispute when the witness had not so testified. *Barker v. State*, 138.
2. *Race prejudice argument to jury held improper.*  
It was improper for counsel in his argument to state to the jury that the defendant "has enough African in him to make him as mean as Hades itself;" race, creed, or caste not being in issue. *Funches v. State*, 141.
3. *Refusal to instruct that accused's failure to testify should not operate to his prejudice held error.*  
It is error to refuse instruction telling jury that failure of defendant to testify shall not operate to his prejudice, under section 1918, Code 1906 (Hemingway's Code, section 1578). *Ib.*
4. *"Accomplice" defined; question for court whether witness was an "accomplice" when facts undisputed.*  
One who is present aiding, assisting, abetting, and encouraging the commission of a crime is an accomplice, and, where there is no conflict in the testimony as to the acts, conduct, or participation of a witness in an alleged crime, it is a question of law for the court as to whether the witness was in fact an accomplice. *Dedeaux v. State*, 326.
5. *Court should instruct as to weight of accomplice testimony, but language of instruction is in court's discretion.*  
While a conviction may be had on the uncorroborated testimony of an accomplice, the court should instruct the jury that the testimony of an accomplice is to be weighed with caution, but the language in

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CRIMINAL LAW.

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## CRIMINAL LAW—Continued.

which the cautionary instruction is stated must, in a large measure, be left to the discretion of the trial court. *Dedeaux v. State*, 326.

6. *Larceny. Instruction omitting element of felonious or fraudulent taking error.*

Under section 1251, Code 1906 (Hemingway's Code, section 981), the word "felonious" as used in this section is not merely descriptive of the grade of the offense, but a felonious or fraudulent taking is necessary to constitute the crime of larceny, and an instruction which omits this essential element is erroneous. *Ib.*

7. *Evidence as to finding of other property similar to that stolen at different place held inadmissible.*

In a prosecution for the larceny of particularly described sheep, where the evidence shows that the sheep alleged to have been stolen had been killed and buried in a certain pit, it is erroneous to admit testimony that other sheep were found buried at a different place and in another pit. *Ib.*

8. *That other sheep of same owner disappeared held inadmissible.*

In a prosecution for the larceny of particularly described sheep, it is error to admit testimony that several months prior to the alleged theft the owner of the particular sheep alleged to have been stolen also owned a large number of other sheep, and that they had disappeared from the range at the time of the trial. *Ib.*

9. *Evidence insufficient to show conviction of prior offenses under statute.*

Where a person is indicted for the unlawful sale of intoxicating liquors under section 1 (c), chapter 214, Laws 1912 (section 2086, Hemingway's Code), which provides that on conviction the punishment shall be "by imprisonment in the state penitentiary not less than one year nor more than five years, if the conviction is for an offense under this Act committed after the person convicted has been convicted and punished for two former offenses thereunder," and the testimony as to the two former convictions and punishments showed that the defendant had pleaded guilty in a justice of the peace court and prosecuted an appeal to the circuit court, in which court the cases were docketed, and the minutes of the circuit court fail to show any disposition of the cases in that court, they are still pending cases in the circuit court. Consequently there is no proof of two former convictions and punishments under this act. *Williams v. State*, 347.

10. *Punishment as for first conviction only held warranted.*

Under this testimony the defendant can only be punished as for a first conviction under section 1 (a) of this act. *Ib.*

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DAMAGES.

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## CRIMINAL LAW—Continued.

11. *Minutes of circuit court cannot be contradicted by parol; supreme court orders and judgments shown by minutes.* The circuit court speaks through its minutes. These court minutes import absolute verity and cannot be contradicted by parol. The orders and judgment of this court are shown on its minutes. *Ib.*
12. *Procedure, when insanity of defendant suggested, stated.*  
If, at the arraignment of a defendant charged with the commission of a crime, it is suggested or appears to the court that he may be insane, the question of his sanity *vel non* should be inquired into and determined, and, if he should be found to be then insane, his trial should not be proceeded with unless and until he recovers his sanity. *Hawie v. State*, 589.
13. *Test of sanity is whether defendant can make rational defense.*  
The test of a defendant's sanity in an inquiry to determine whether he shall be put on trial in a criminal case is whether he can then make a rational defense. *Ib.*

## DAMAGES.

1. *Appeal and error. Damages for loss of arm held grossly inadequate; where damages inadequate; judgment will be reversed only as to amount.*

Where, in a suit for damages by a laborer against his employer, the jury found that the injury was the result of the negligence of defendants, the verdict of the jury awarding plaintiff the sum of three hundred dollars as compensation for his suffering and for the loss of an arm is grossly inadequate, and the court on appeal will reverse the judgment of the lower court in so far as it adjudges the amount of damages to be recovered, but will allow the judgment as to liability to stand. *McLaughlin v. R. W. Faganpeel Co.*, 116.

2. *Costs. No attorney's fee held allowable for defending judgment in injunction suit on appeal.*

Where an injunction is sued out to restrain sales of property under mortgages, deeds of trusts, or judgments, the 5 per cent. damages allowed under the provision of section 623, Code of 1906, (section 383, Hemingway's Code), for the dissolution of such injunction includes all damages, and no more can be recovered, and this is true even though there is an appeal to the Supreme Court from the judgment dissolving the injunction, and, consequently, where the 5 per cent. damage has been recovered in the court below, no attorney's fee will be allowed here for defending the judgment on appeal. *Smith v. Perkins et al.*, 203.

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DAMAGES.

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## DAMAGES—Continued.

3. *Animals. Statute imposes absolute liability on owner of trespassing stock.*

Under the stock law contained in chapter 50, Code of 1906 (chapter 102, Hemingway's Code), the owners of the domestic animals therein named are required to fence such animals against the crops, and crops may be cultivated on uninclosed lands; and section 2222, Code of 1906 (section 4541, Hemingway's Code), being part of said stock law, makes the owner of trespassing stock absolutely liable for damages done by them to the crops of others, and questions of due care and negligence in confining stock are eliminated. *Minor v. Dockery*, 727.

4. *Animals. Agent in control of trespassing stock not liable for damages.*

A mere agent in control of the cattle, horses, and mules belonging to his principal is not liable for damages done by such animals in trespassing upon the crops of another, under the principle that an agent is liable to no one except his principal for damages resulting from an omission or neglect of duty in respect to the business of the agency. *Ib.*

5. *Drains. Landowner held not entitled to damages to crops through enlargement of canal.*

The landowner adjoining a right of way of a drainage canal cannot recover damages for injuries sustained to his crops caused by the damming up of the canal, which was made necessary in order to enlarge and dig deeper the canal, when this work is done in a proper workmanlike manner, in accordance with the plan legally adopted for its performance by the drainage commissioners. For all of this damage he, or his predecessor in title, is supposed to have been paid when the right of way was granted to the drainage district. *Moore v. Swamp Dredging Co. Inc.*, 842.

6. *Drains. Successor of grantor to drainage district cannot sue for damages from construction or maintenance.*

When a landowner has granted to a drainage district a right of way over his land for the purpose of constructing and maintaining canals and ditches, his successor in title cannot thereafter sue the district or the contractor for damages which resulted, either from its construction or maintenance, if the work was done in a proper workmanlike manner. All these damages caused to the landowner are presumed to have been paid for because of the grant. *Ib.*

7. *Drains. No action by landowner for damages for construction or maintenance of ditches in proper workmanlike manner.*

Though the landowner may be damaged because of the doing of this work in a proper workmanlike manner, there was no invasion of

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DEATH—DEEDS.

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## DAMAGES—Continued.

his legal rights, and it is a case of *damnum absque injuria*, for which no action may be maintained. *Ib.*

8. *Waters and water courses. Evidence held insufficient to sustain judgment against railroad company for flooding lands by filling in trestle.*

In a suit against a railroad company for damages to growing crops caused by filling in a portion of a trestle over a stream and thereby obstructing the flow of the flood waters of the stream, so as to cause the waters to be impounded on the lands of plaintiff to an increased depth, and to remain on the land longer than they would if the trestle had not been filled, where the undisputed testimony shows that there was an excessive rainfall and several extraordinary overflows, which flooded the entire valley of the stream, both above and below the railroad embankment, a judgment for plaintiff will be reversed, where there is no testimony which would enable the jury to separate the damages attributable to the wrongful act of the railroad company from that caused by the excessive rains on the crops and the consequent flooding of the land independent of the trestle. *Davis, Federal Agent, et al. v. Hambrick et al.*, 859.

## DEATH.

*Verdict in excess of present cash value of expectancy under federal act reduced.*

Where in a suit against a railroad company for an injury to a servant no case for punitive damages is made, and where the court instructs the jury that the rules applicable to the federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665) governs the amount of damages, and where the verdict is in excess of the amount of the present cash value of that part of the expectancy which they could recover under such rule, but in fact the liability is governed by state law, the verdict will not be permitted to stand, unless a remittitur is entered, reducing the amount to such sum as could stand under such rule of liability. *Hines Agent v. Green*, 477.

## DEEDS.

1. *Corporations. Corporate deed executed by secretary to himself as grantee not void, where president also joined.*

The fact that a deed from a corporation to an individual to land was executed on the part of the corporation by its secretary, who was also grantee in the deed, does not render the conveyance void, where the president of the corporation also joined in the execution of the deed, under section 2766, Code of 1906 (section 2270, Hemingway's Code), which provides, among other things, that a corporation may

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 DESCENT AND DISTRIBUTION—DISMISSAL AND NONSUIT.
 

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## DEEDS—Continued.

convey its land under the corporate seal and the signature of an officer. *Mexican Gulf Land Co. v. Globe Trust Co.*, 862.

2. *Acknowledgment.* Corporation's deed need not be acknowledged nor filed for record as between parties.

A conveyance of land by a corporation, in order to be valid as between the parties thereto, is not required to be acknowledged by the officer executing the same for the corporation, nor filed for record; such a deed being valid without being so acknowledged and filed for record; acknowledgment and recording being required for the purpose alone of constructive notice to others subsequently dealing with the land conveyed. *Ib.*

3. *Cancellation of instruments.* Petition held insufficient to state grounds for cancellation of corporation's deed to its secretary.

A bill in equity by the grantor in a deed against the grantee to set aside and cancel such deed as a cloud upon the grantor's title, the grantor being a corporation, which alleges as grounds for cancellation of such deed that the consideration therein mentioned is "feigned and fictitious;" that the grantee in the deed was the secretary of the grantor corporations, and joined in the execution of the deed to himself, together with the president of the corporation; that the deed was not legally acknowledged by the president of the corporation—states no grounds for cancellation of such deed. *Ib.*

## DESCENT AND DISTRIBUTION.

*Husband, not provided for in will, held entitled to undivided one-half interest in homestead lands devised by wife.*

Where a husband of a testatrix did not possess a separate estate at the death of his wife, who devised lands constituting the exempt homestead of both, and where there is no provision for the husband in the will, and there are no children nor descendants of such, the husband is, under section 5087, Code of 1906 (section 3375, Hemingway's Code), entitled to an undivided one-half interest in the lands devised, and this right of the surviving husband is not affected or defeated by the fact that decedent was partially intestate, and that the property not disposed of by the will, and which under the laws of descent passed to the husband as sole heir, constituted, in value, more than one-half of the entire estate of decedent. *Cain et al. v. Barnwell*, 123.

## DISMISSAL AND NONSUIT.

1. *Appeal and error.* Appeal will be dismissed where the real purpose is to obtain reversal but affirmance.

An appeal will be dismissed where the real purpose is not to obtain a

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DISMISSAL AND NONSUIT.

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## DISMISSAL AND NONSUIT—Continued.

reversal of the decree but to have it affirmed; there being no actual controversy of either law or of fact to be decided. *Smith v. Citizens Bank & Trust Co.*, 139.

2. *Appeal and error. Striking stenographer's transcript of evidence no ground for dismissal of appeal.*

An appeal will not be dismissed for the reason that the stenographer's transcript of the evidence has been stricken from the record. *McBee & Gossett v. Cahaba Const. Co. et al.*, 227.

3. *Evidence. Evidence of nonpayment of judgment in fact admissible.*

Where a pending lawsuit is compromised for a certain amount which is paid to the plaintiffs and an order of dismissal taken in the case, which by agreement is set aside and a formal judgment entered reciting a trial by a jury and verdict for a certain sum, which judgment was voluntarily marked satisfied by plaintiffs, testimony is admissible to show that no loss was incurred and no money actually paid out in satisfaction of this judgment. *Armstrong v. Employers Assur. Corp.*, 570.

4. *Evidence. Evidence showing no loss sustained by assured, and no money paid by him, held competent in suit on indemnity policy.*

Where a party has compromised a suit against him, and paid to the plaintiffs the sum of three thousand five hundred dollars in full settlement therefor, and had the suit dismissed, and subsequently, at the request of the insurance company, which has agreed to pay any loss by reason of liability imposed by law upon the assured (the plaintiff) for damages on account of personal injuries, and upon the request of the insurance company the order of dismissal is set aside and a judgment entered, reciting a trial by jury and a verdict in plaintiff's favor for this amount, which judgment is marked satisfied by the plaintiffs, under this insurance agreement it is competent for the insurance company to prove that no loss was sustained by the assured, and no money was paid out by him in satisfaction of the judgment, but that the amount was actually paid before the judgment was entered. This testimony in no wise impeaches the records of the court showing the entry and satisfaction of the judgment. *Ib.*

5. *Appeal and error. Dismissal and nonsuit. Trial. Misjoinder of parties plaintiff cannot be urged on appeal unless notice given and misjoinder pleaded below; peremptory instruction against either party proper where evidence justifies it; plaintiff may take nonsuit at any time before verdict.*

Misjoinder of party plaintiffs in a suit cannot be taken advantage of on appeal unless notice was given and the misjoinder pleaded in the  
125 Miss.—60

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 DIVORCE,
 

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## DISMISSAL AND NONSUIT—Continued.

lower court. It is proper to grant a peremptory instruction against either party where the evidence justifies it. It is a legal privilege of a plaintiff to take a nonsuit in a case at any time before verdict. *Payne, Director General of Railroads v. Stevens et al.*, 582.

6. *Appeal and error. Supreme court may dismiss bill on affirming decree sustaining demurrer.*

When a decree sustaining a demurrer to a bill in equity is affirmed on an appeal to settle the principles of the case, and it does not appear that any amendment can be made to the bill of such character as to entitle the complainant to relief, the cause will not be remanded, but a final decree dismissing the bill will be rendered by the supreme court. *Parker v. Board of Sup'rs of Grenada County*, 617.

## DIVORCE.

1. *Chancery court may allow such alimony as is equitable and just with regard to circumstances.*

The power of a chancery court to award alimony to a wife in a divorce proceeding is measured by section 1673, Code of 1906 (section 1415, Hemingway's Code), and is to make such allowance therefor as may seem equitable and just, having regard to the circumstances of the parties and the nature of the case. *Ramsay v. Ramsay*, 185.

2. *Alimony may be awarded wife, although husband without property.*

Alimony may be awarded the wife in a divorce proceeding, although the husband is without property and must support himself and pay the alimony out of his future earnings. *Ib.*

3. *Financial situation of parties should be considered.*

When the husband is without property and must support himself out of his own earnings, and the wife is able to and does earn something by her own labor; that fact should be taken into consideration in determining what amount the husband should contribute to her support, unless the prospective earnings of the husband are sufficient in amount to make it equitable and just for him to bear the whole burden of the wife's support. *Ib.*

4. *Husband's failure to pay alimony under decree prima-facie evidence of contempt.*

The failure of the husband to comply with the decree providing for the payment of alimony is prima-facie evidence of contempt, to purge which the burden is upon him to prove his inability to pay. *Ib.*

5. *Husband should not be committed, when he can pay alimony only of future earnings.*

A husband should not be committed to prison until he pays the arrears

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DRAINS.

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## DIVORCE—Continued.

of alimony allowed to the wife when he has no property and can pay the alimony only out of his future earnings. *Ib.*

6. *Husband not in contempt for failure to obtain sureties, when he is unable to do so.*

Under section 1673, Code of 1906 (section 1415, Hemingway's Code), the court may, "if need be, require sureties for the payment of the sum so allowed" to the wife as alimony; but, when the giving of such sureties is ordered, the husband is not in contempt until he fails to obey the order, and not then if his failure to obey the order solely from his inability to do so. *Ib.*

7. *Court awarding alimony may fine husband for wilful failure to pay.*

The court which rendered a decree awarding alimony to the wife may enter a fine against the husband for failure to pay the alimony, when the failure to pay was willful. *Ib.*

8. *Acts of cruelty need not be malicious to constitute ground parties in pari delicto.*

In an action for divorce based upon the ground of habitually cruel and inhuman treatment, it is not necessary that the acts of alleged cruelty shall be malicious; such acts are to be judged by the effect produced and the motives prompting them are immaterial. *McNeill v. McNeill*, 277.

9. *Sufficient if acts of cruelty create reasonable apprehension of danger to life or health.*

In an action for divorce based upon habitually cruel and inhuman treatment, in order that the complaining party may be entitled to relief, it is not necessary that the acts of alleged cruelty shall be, in fact, menacing to the life or health of complainant; but, if the alleged acts of cruelty are such as to create in the mind of the complainant a reasonable apprehension of such danger, relief should be granted. *Ib.*

## DRAINS.

1. *Landowner held not entitled to damage to crops through enlargement of canal.*

The landowner adjoining a right of way of a drainage canal cannot recover damages for injuries sustained to his crops caused by the damming up of the canal, which was made necessary in order to enlarge and dig deeper the canal, when this work is done in a proper workmanlike manner, in accordance with the plan legally adopted for its performance by the drainage commissioners. For all of this damage he, or his predecessor in title, is supposed to have been paid

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EMBEZZLEMENT—EQUITY.

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## DRAINS—Continued.

when the right of way was granted to the drainage district. *Moore v. Swamp Dredging Co., Inc.*, 842.

2. *Successor of grantor to drainage district cannot sue for damages from construction or maintenance.*

When a landowner has granted to a drainage district a right of way over his land for the purpose of constructing and maintaining canals and ditches, his successor in title cannot thereafter sue the district or the contractor for damages which resulted, either from its construction or maintenance, if the work was done in a proper workmanlike manner. All these damages caused to the landowner are presumed to have been paid for because of the grant. *Ib.*

3. *No action by landowner for damages for construction or maintenance of ditches in proper workmanlike manner.*

Though the landowner may be damaged because of the doing of this work in a proper workmanlike manner, there was no invasion of his legal rights, and it is a case of *damnum absque injuria*, for which no action may be maintained. *Ib.*

4. *Drainage district must exercise reasonable care and skill.*

In the exercise of its privileges and powers a drainage district must exercise reasonable care and skill, and, if it be necessary to do a particular act in a particular manner, it may do so, though evil may result to others; but if the same act may as easily be done in another way, without hurt to others, it is the duty of the drainage district to adopt the nonhurtful method of exercising its powers. *Ib.*

## EMBEZZLEMENT.

*Proof of fiduciary relation necessary.*

Under indictment for embezzlement, proof of a fiduciary relation must be made before conviction lies for appropriating funds; and where the state's evidence shows no agency or relation of trust, but shows contractual payment of funds by owner to contractor, *held*, that embezzlement is not proven and accused should be discharged. *Lawson v. State*, 754.

## EQUITY.

*Judgment. Offer of equity unnecessary before garnishee may have relief against extinguished judgment.*

Where a judgment against a garnishee has become invalid because the judgment in the main action has been annulled by reversal, it is not incumbent upon the garnishee to offer to do equity to the assignee of the judgment before he is entitled to relief against the extinguished garnishment judgment. *Moody v. Williams*, 770.

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ESTOPPEL—EVIDENCE.

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## ESTOPPEL.

See PUBLIC LANDS.

## EVIDENCE.

1. *When certified copy of law of fraternal benefit order is introduced burden is on other party to show it had not been filed.*

Under section 22, ch. 206, Laws 1916, printed copies of the constitution and laws as amended, changed, or added to, certified by the secretary or corresponding officer of the society, are prima facie evidence of the legal adoption thereof, and when a copy so certified has been introduced in evidence by a defendant society, the burden is on the plaintiff to show that such by-law, rule, or regulation has not been filed with the Insurance Commissioner. *Sovereign Camp, W. O. W., v. Garner*, 8.

2. *Corporations. Evidence of contract with president insufficient to show contract of sale by corporation, in absence of showing that he contracted for it.*

In a suit against a corporation upon a contract of sale, the evidence must show with reasonable certainty that the contract was made with the corporation. Showing a contract with the president of the corporation is not enough. There must be some evidence tending to prove that the president of the corporation was contracting for the corporation. *Brownlee Lumber Co. v. Gaudy*, 71.

3. *Indictment and information. After reassembly of grand jury during term, evidence that no witnesses appeared before it upon return of indictment held inadmissible.*

The court cannot inquire into the character of the evidence before the grand jury upon which an indictment was found, and when a grand jury has been reassembled during a term of court and has returned an indictment upon which the names of witnesses are indorsed, evidence to show that no witnesses appeared before the grand jury on the date it reconvened and returned the indictment is inadmissible. *Kysar v. State*, 79.

4. *Trial. Party suing for blocking of crossing cannot testify to length of blocking in rebuttal.*

Where a suit for personal injury is predicated upon blocking a crossing for more than the statutory period, and the plaintiff testifies as to the injury and introduces an ordinance prohibiting the blocking of a street crossing for more than five minutes, but fails to testify in his chief examination that the crossing was blocked longer than five minutes, he is not entitled to testify to such fact in rebuttal by reason of section 1985, Code of 1906 (Hemingway's Code, section 1645). *Mock v. Hines*, 111.

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EVIDENCE.

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## EVIDENCE—Continued.

5. *Criminal law. Evidence as to finding of other property similar to that stolen at different place held inadmissible.*

In a prosecution for the larceny of particularly described sheep, where the evidence shows that the sheep alleged to have been stolen had been killed and buried in a certain pit, it is erroneous to admit testimony that other sheep were found buried at a different place and in another pit. *Dedeaux v. State*, 326.

6. *Criminal law. That other sheep of same owner disappeared held inadmissible.*

In a prosecution for the larceny of particularly described sheep, it is error to admit testimony that several months prior to the alleged theft the owner of the particular sheep alleged to have been stolen also owned a large number of other sheep, and that they had disappeared from the range at the time of the trial. *Ib.*

7. *Criminal law. Evidence insufficient to show conviction of prior offenses under statute.*

Where a person is indicted for the unlawful sale of intoxicating liquors under section 1 (c), chapter 214, Laws 1912 (section 2086, Hemingway's Code), which provides that on conviction the punishment shall be "by imprisonment in the state penitentiary not less than one year nor more than five years, if the conviction is for an offense under this Act committed after the person convicted has been convicted and punished for two former offenses thereunder," and the testimony as to the two former convictions and punishments showed that the defendant had pleaded guilty in a justice of the peace court and prosecuted an appeal to the circuit court, in which court the cases were docketed, and the minutes of the circuit court fail to show any disposition of the cases in that court, they are still pending cases in the circuit court. Consequently there is no proof of two former convictions and punishments under this act. *Williams v. State*, 347.

8. *Landlord and tenant. Parol evidence not admissible to vary deed conveying leased premises without reserving rent.*

Where a landlord conveys the leased premises by deed without reserving the rent in the deed, the rent passes to the grantee, and parol evidence is not admissible to show oral understandings and agreements between the parties contrary to the legal effect of the deed. *O'Keefe et al. v. McLemore*, 395.

9. *Railroads. Burden imposed by prima facie statute.*

Under our prima-facie statute (section 1985, Code of 1906; section 1645, Hemingway's Code), where it is shown by proof that the injury was caused by the running of cars, and it is also established that the speed of the cars was unlawful at the time of the injury, it is in

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EVIDENCE.

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## EVIDENCE—Continued.

cumbent upon the railroad company, before it is entitled to a peremptory instruction, to explain and show how the injury occurred, and that it was not proximately caused by its negligence in the running of the cars at an unlawful rate of speed; and, unless the evidence exonerates the railroad company from negligence proximately causing the injury, the burden imposed by the *prima-facie* statute has not been met. *Bonds v. Mobile & O. R. Co.*, 547.

10. *Indictment and information. Evidence before grand jury cannot be inquired into.*

The evidence on which the grand jury acted in finding an indictment cannot be inquired into on the trial of the defendant on the indictment. *Baldwin v. State*, 561.

11. *Evidence of nonpayment of judgment in fact admissible.*

Where a pending lawsuit is compromised for a certain amount which is paid to the plaintiffs and an order of dismissal taken in the case, which by agreement is set aside and a formal judgment entered reciting a trial by a jury and verdict for a certain sum, which judgment was voluntarily marked satisfied by plaintiffs, testimony is admissible to show that no loss was incurred and no money actually paid out in satisfaction of this judgment. *Armstrong v. Employer's Assur. Corp.*, 571.

12. *Testimony of nonpayment of satisfaction money held not to vary court records showing satisfaction of judgment.*

This testimony does not vary, alter, contradict, or impeach the records of the court, which records show the rendition and satisfaction of the judgment. *Ib.*

13. *Evidence showing no loss sustained by assured, and no money paid by him, held competent in suit on indemnity policy.*

Where a party has compromised a suit against him, and paid to the plaintiffs the sum of three thousand five hundred dollars in full settlement therefor, and had the suit dismissed, and subsequently, at the request of the insurance company, which has agreed to pay any loss by reason of liability imposed by law upon the assured (the plaintiff) for damages on account of personal injuries, and upon the request of the insurance company the order of dismissal is set aside and a judgment entered, reciting a trial by jury and a verdict in plaintiff's favor for this amount, which judgment is marked satisfied by the plaintiffs, under this insurance agreement it is competent for the insurance company to prove that no loss was sustained by the assured, and no money was paid out by him in satisfaction of the judgment, but that the amount was actually paid before the judg-

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EXECUTORS AND ADMINISTRATORS.

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## EVIDENCE—Continued.

ment was entered. This testimony in no wise impeaches the records of the court showing the entry and satisfaction of the judgment. *Armstrong v. Employer's Assur. Corp.*, 571.

14. *Plans and specifications under building contract admissible though not signed.*

Where the contract is to build according to certain plans and specifications, and the building is constructed under them, as originally drawn or as modified, they are admissible in evidence in a suit by the contractor against the owner to recover a balance due on the contract, even though not signed by the parties for identification purposes, as stipulated in the contract; acting under them being a waiver of signing. *Burnstein v. Angelletty*, 656.

15. *Parol agreement as to place of storage admissible where receipt silent.*

Where a warehouse receipt for the storage of a bale of cotton is silent as to the place of storage, evidence is admissible to show a prior parol agreement which specifies the place of storage. *Tallahatchie Compress & Storage Co. v. Hartshorn*, 662.

16. *Embezzlement. Proof of fiduciary relation necessary.*

Under indictment for embezzlement, proof of a fiduciary relation must be made before conviction lies for appropriating funds; and where the state's evidence shows no agency or relation of trust, but shows contractual payment of funds by owner to contractor, *held*, that embezzlement is not proven and accused should be discharged. *Lawson v. State*, 754.

See SUFFICIENCY OF EVIDENCE.

## EXECUTORS AND ADMINISTRATORS.

1. *Statutory requirement that executor file vouchers for disbursements for annual accounts mandatory.*

Section 2121, Code 1906 (Hemingway's Code, sec. 1789), making it the duty of an executor to produce and file with his annual account vouchers for disbursements made, is mandatory, and it is not within the discretion of the chancellor to dispense at will with this requirement of the statute. *Ridgeway et al. v. Jones*, 22.

2. *Executor may file duplicate of lost vouchers for disbursements.*

Since the vouchers which executors are required to file with their annual accounts are mere receipts for money paid out, there is nothing in the object or purpose sought to be accomplished by their production, or in the nature of the voucher itself which forbids the duplication or substitution of a lost voucher. *Ib.*

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FRAUDULENT CONVEYANCES—FRAUDS, STATUTES OF.

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## EXECUTORS AND ADMINISTRATORS—Continued.

3. *Executor may not pay claims not probated and allowed.*

An executor has no authority to pay claims against the estate of a decedent which have not been probated and allowed, and he should not be allowed credit for claims so paid. *Ib.*

4. *Expenditures for funeral expenses and monument may be allowed if not excessive.*

The reasonableness of expenditures made by the executor for funeral expenses and monument for the deceased testator is a matter which is addressed to the sound judgment and discretion of the chancellor, and an executor may be allowed credit for such expenditures if in the opinion of the chancellor the same are not excessive. *Ib.*

5. *Purchase by executor at sale of property of testator to pay debts invalid unless unreasonable delay in assertion of rights.*

Where an executor is charged under the will of the testator with the duty of paying debts, and who, having funds to pay the debts, permits the property to be sold, and buys at such sale, neither the executor nor those buying with notice of such facts will be permitted to hold such property against those entitled thereto, unless after notice of such sale there is unreasonable delay in asserting such right to set aside the sale. *Belt et al. v. Adams*, 387.

## FRAUDULENT CONVEYANCES.

*Conduct of business by bankrupt's wife with husband as manager without sign on building held not a violation of the Sign Statute.*

Where a shoe company sells to a customer a bill of shoes and such customer is adjudged a bankrupt and the trustee in bankruptcy sells the stock of goods, including the shoes, to a firm bidding thereon, for cash, and the money is paid, and such bidder then sells the stock of goods to the wife of the bankrupt, taking her notes therefor, and where she opens a business in her own name, in which business her husband is made manager, but buys and sells in her name and pays out of her funds, no goods being bought in the husband's credit or with his means, the failure to have a sign on the building where the business is conducted does not make a case under the sign statute (section 4784, Code of 1906; Hemingway's Code, section 3128), and it is error under such facts to grant a peremptory instruction for the judgment creditor of the husband on the theory that the sign statute is applicable. *Rubenstein et al. v. Lynchburg Shoe Co.*, 528.

## FRAUDS, STATUTES OF

*Verbal lease, constituting completed contract, held not unenforceable under statute.*

A lessee, who has entered into possession of land under a verbal lease

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GARNISHMENT—GRAND JURY.

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## FRAUDS, STATUTES OF—Continued.

which was not to be performed within one year and has completed the contract, is liable for the rent; and when a lessor has exercised a contractual right to terminate a verbal lease at the end of a yearly period, this constitutes the lease a complete contract, and the mere failure to discharge mutual monetary obligations on a verbal contract otherwise completed does not render such contract unenforceable under the statute of frauds. *Fronkling v. Berry*, 763.

## GARNISHMENT.

*Judgment against garnishee extinguished on reversal of main judgment.*

A judgment against a garnishee is incidental to, and dependent upon, the main judgment, and cannot stand where the judgment in the main action has been annulled by reversal. *Moody & Williams v. Dye et al.*, 770.

## GRAND JURY.

1. *Circuit court may during term reassemble grand jury after discharge when 15 or more of the original members respond.*

The circuit court has power, during the term, to reassemble a grand jury after it has been discharged, under Code of 1906, § 2706 (Hemingway's Code, § 2199), authorizing the court in its discretion to adjourn the grand jury to a subsequent day of the term, and Code 1906, § 2718 (Hemingway's Code, § 2211), declaring the jury laws to be merely directory, and, under Code 1906, § 2700 (Hemingway's Code, § 2193), providing that a grand jury shall consist of not less than 15 members, when 15 or more of the original members of the body respond to the notice to reassemble and are present during its deliberations, the legality of any action of the reassembled grand jury is not affected by the absence of a particular member. *Kysar v. State*, 79.

2. *Indictment and information. After reassembly of grand jury during term, evidence that no witnesses appeared before it upon return of indictment held inadmissible.*

The court cannot inquire into the character of the evidence before the grand jury upon which an indictment was found, and when a grand jury has been reassembled during a term of court and has returned an indictment upon which the names of witnesses are indorsed, evidence to show that no witnesses appeared before the grand jury on the date it reconvened and returned the indictment is inadmissible. *Ib.*

3. *Indictment and information. Evidence before grand jury cannot be inquired into.*

The evidence on which the grand jury acted in finding an indictment

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HIGHWAYS.

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## GRAND JURY—Continued.

cannot be inquired into on the trial of the defendant on the indictment. *Baldwin v. State*, 561.

## HIGHWAYS.

1. *Balance due contractor not subject to lien under statute by filing claim with board of supervisors.*

The public roads and property of a county are not subject to the lien created under section 3074, Code of 1906 (Hemingway's Code, section 2434), in favor of laborers and subcontractors, and by filing with the board of supervisors a notice, claiming a lien on the balance in the hands of the county authorities to the credit of the principal contractor of such roads, a subcontractor can acquire no lien on such balance. *McGraw v. Board of Sup'rs*, 421.

2. *Adjudicated balance due road contractor assignable; assignee of road contractor may compel issuance of warrant for balance on contract.*

When a contractor has constructed public roads in a county or subdivision thereof, and such roads have been completed and accepted, and the balance due such contractor for the construction of the roads has been finally adjudicated by the board of supervisors, and there only remains the duty of ordering the issuance of a warrant for his balance, the contractor may assign this balance due to him, and the assignee thereof may maintain mandamus to compel the board of supervisors to issue to him a warrant for the balance so assigned. *Ib.*

3. *Highway commissioners held to have no control over funds derived under statute.*

Highway commissioners appointed under the provisions of chapter 145, Laws of 1912, and its amendments (Hemingway's Code, section 7158 et seq.), have no control over the funds derived under the provisions of that statute, except that they must be paid out by the board of supervisors on the recommendation of the commissioners. *Shell et al., Com'rs v. Monroe County*, 562.

4. *Commissioners have no authority to let contracts until engineer's survey and estimate adopted and ratified.*

The provision of section 5, chapter 176, Laws of 1914 (Hemingway's Code, section 7162), providing for the appointment of road commissioners and requiring them to employ a competent engineer to survey and lay out such road or roads as should be selected by such commissioners to be constructed and maintained, and making it the duty of such engineer to make an estimate of the cost of constructing and maintaining such highway for each separate mile covered by such survey, and to report the survey and estimate to the commissioners before contracts are let for the construction, or the construction and

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 INDICTMENT AND INFORMATION—INJUNCTION.
 

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## HIGHWAYS—Continued.

maintenance of such roads, are mandatory, and until such surveys and estimate have been filed and adopted by the commissioners and ratified by the board of supervisors, the commissioners are without authority to let contracts for the construction of such roads. *Ellis et al. v. Tillman et al.*, 678.

## INDICTMENT AND INFORMATION.

1. *After reassembly of grand jury during term, evidence that no witnesses appeared before it upon return of indictment held inadmissible.*

The court cannot inquire into the character of the evidence before the grand jury upon which an indictment was found, and when a grand jury has been reassembled during a term of court and has returned an indictment upon which the names of witnesses are indorsed, evidence to show that no witnesses appeared before the grand jury on the date it reconvened and returned the indictment is inadmissible. *Kyar v. State*, 79.

2. *Evidence before grand jury cannot be inquired into.*

The evidence on which the grand jury acted in finding an indictment cannot be inquired into on the trial of the defendant on the indictment. *Baldwin v. State*, 561.

## INJUNCTION.

1. *Costs. No attorney's fee held allowable for defending judgment in injunction suit on appeal.*

Where an injunction is sued out to restrain sales of property under mortgages, deeds of trust, or judgments, the 5 per cent. damages allowed under the provision of section 623, Code of 1906 (section 383, Hemingway's Code), for the dissolution of such injunction includes all damages, and no more can be recovered, and this is true even though there is an appeal to the Supreme Court from the judgment dissolving the injunction, and, consequently, where the 5 per cent. damage has been recovered in the court below, no attorney's fee will be allowed here for defending the judgment on appeal. *Smith v. Perkins*, 203.

2. *Attorney's fees not allowable on dissolution of injunction to enforce illegal agreement.*

Since the courts will not grant relief to either party to an illegal contract, when a suit for injunction is based upon an illegal agreement, and the parties thereto are *in pari delicto*, attorney's fees should not be allowed to the defendant upon the dissolution of the injunction. *Louenbourg v. Klein et al.*, 285.

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INSANE PERSONS—INSTRUCTIONS.

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## INJUNCTION—Continued.

3. *Mortgages. Foreclosure sale will be enjoined where tender by check sufficient, although money not actually paid into court.*

Where, in such case, the maker of the notes tenders to the holder in good faith the amount claimed to be due by her, by check, which is not accepted, but refused on the ground that the amount is not sufficient, and not on the ground it is not money, and the proof shows that the money was in the bank to the credit of the drawer of the check, and that it would have been paid if presented; and, where under the contract the holder of the mortgage and notes attempts to advance the unmatured debt on a theory of default, and advertises the property for sale, an injunction will lie to restrain the sale, and this is true though the bill only offers to pay the amount due, and does not actually pay the money into court, as the complainant should ordinarily do. *Tonkel v. Shields*, 467.

4. *Judgment. Suit to restrain execution of judgment against garnishee direct attack.*

Where a judgment against a garnishee is extinguished by the annulment of the main judgment, the garnishee may enjoin execution of the judgment against him; such attack being direct and not collateral. *Moody & Williams v. Dye et al.*, 770.

## INSANE PERSONS.

1. *Criminal law. Procedure, when insanity of defendant suggested, stated.*

If, at the arraignment of a defendant charged with the commission of a crime, it is suggested or appears to the court that he may be insane, the question of his sanity *vel non* should be inquired into and determined, and, if he should be found to be then insane, his trial should not be proceeded with unless and until he recovers his sanity. *Hawie v. State*, 589.

2. *Criminal law. Test of sanity is whether defendant can make rational defense.*

The test of a defendant's sanity in an inquiry to determine whether he shall be put on trial in a criminal case is whether he can then make a rational defense. *Ib.*

## INSTRUCTIONS.

1. *Criminal law. Instruction assuming that witness testified to material fact in dispute erroneous.*

An instruction is erroneous that assumes and in effect charges the jury that a witness testified to a material fact which is in dispute when the witness had not so testified. *Barber v. State*, 138.

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INSTRUCTIONS.

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## INSTRUCTIONS—Continued.

2. *Criminal law. Refusal to instruct that accused's failure to testify should not operate to his prejudice held error.*

It is error to refuse instruction telling jury that failure of defendant to testify shall not operate to his prejudice, under section 1918, Code 1906 (Hemingway's Code, section 1578). *Funches v. State*, 141.

3. *Negligence. Instruction on diminishment of damages for contributory negligence held erroneous.*

An instruction on diminishment for contributory negligence which told the jury to award such damages as bears the same proportion to the damages which would have been recoverable had not deceased been guilty of negligence that the negligence of deceased bears to the combined negligence of deceased and defendant is erroneous. *Yazoo & M. V. R. Co. v. Mullins*, 242.

4. *Bastards. Instruction limiting consideration to intercourse by defendant held erroneous under evidence.*

In a bastardy case it is error to instruct the jury that the "sole and only question in this case is whether or not the defendant had intercourse with the prosecutrix at or near the proper time which in the course of nature would or might make him the father of her child," when there was evidence to support the theory that another man had probably had intercourse with the prosecutrix within the period of gestation. *Wilson v. Hendrix*, 273.

5. *Criminal law. Court should instruct as to weight of accomplice testimony, but language of instruction is in court's discretion.*

While a conviction may be had on the uncorroborated testimony of an accomplice, the court should instruct the jury that the testimony of an accomplice is to be weighed with caution, but the language in which the cautionary instruction is stated must, in a large measure be left to the discretion of the trial court. *Dedeaux v. State*, 326.

6. *Criminal law. Larceny. Instruction omitting element of felonious or fraudulent taking error.*

Under section 1251, Code 1906 (Hemingway's Code, section 981), the word "felonious" as used in this section is not merely descriptive of the grade of the offense, but a felonious or fraudulent taking is necessary to constitute the crime of larceny, and an instruction which omits this essential element is erroneous. *Ib.*

7. *Trial. Instructions must be considered as a whole.*

The instructions given by the trial court in a jury trial are to be taken and considered as a whole, one as supplementing or modifying another, and if when so construed they present the law fully and fairly, the court will not reverse for the giving of a single instruction for

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INSTRUCTIONS.

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## INSTRUCTIONS—Continued.

one party, though it may not be free from criticism. *Mutual Life Ins. Co. v. Vaughan*, 369.

8. *Carriers. Instructions as to liability for carrying child past destination in violation of special contract held not erroneous.*

In a suit for damages for failure to put a child off at its destination, under a special contract so to do, to instruct the jury that, if the jury believed the ticket agent agreed that the conductor would put the child off at its destination, and that the conductor promised the same thing, and if they believed that it was within the scope of the authority of these employees to bind the railroad company by an agreement or promise made by the conductor and ticket agent, that then the defendant would be liable for the conductor's failure to put the child off, is not erroneous, where the evidence sustains such facts. The fact that the conductor was without authority to make a special contract would be immaterial, where the ticket agent had such power and did make such contract. It merely imposed on the plaintiff the necessity of proving more than was needed under the law, it being sufficient to prove that the ticket agent had power to and did make such contract, and that the carrier breached its duty thereunder. *Yazoo & M. V. R. Co. v. O'Keefe*, 536.

9. *Appeal and error. Dismissal and nonsuit. Trial. Misjoinder of parties plaintiff cannot be urged on appeal unless notice given and misjoinder pleaded below; peremptory instruction against either party proper where evidence justifies it; plaintiff may take nonsuit at any time before verdict.*

Misjoinder of party plaintiffs in a suit cannot be taken advantage of on appeal unless notice was given and the misjoinder pleaded in the lower court. It is proper to grant a peremptory instruction against either party where the evidence justifies it. It is a legal privilege of a plaintiff to take a nonsuit in a case at any time before verdict. *Payne, Director Gen., v. Stevens et al.*, 582.

10. *Master and servant. "Willfully entice away or knowingly employ" servant implies actual knowledge.*

In an action brought by an employer against a third person for willfully interfering with, enticing, or knowingly employing a servant (who had entered into a contract for a given period), without obtaining the consent of the employer, it was error to charge the jury that it would find for the plaintiff if the defendant at the time of the hiring "knew or ought to have known that said contract had not expired." The words of the statute "shall willfully interfere with, entice away, or knowingly employ" mean that the party hiring must have known of the contract at the time of the hiring, and not that he

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INSTRUCTIONS.

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## INSTRUCTIONS—Continued.

might have known by diligent or reasonable inquiry. The knowledge must exist at the time of the hiring. *Beale v. Yazoo Yarn Mill*, 807.

11. *Master and servant. Instruction on knowledge of prior hiring held incorrect.*

In such case it is reversible error to instruct the jury that if they believe from the evidence that the defendant had notice of any fact or circumstance sufficient to put an ordinarily prudent person upon inquiry, and that such inquiry would have developed the fact that the laborer's contract had not expired, and after such fact or circumstance came to defendant's notice he hired the tenant while the contract was in effect, to find for plaintiff. The knowledge of the first contract must exist at the time of the hiring, and mere circumstances which in themselves are insufficient to impute knowledge, but which must be coupled with other facts which would or might be disclosed by inquiry, do not supply the requisite proof. *Ib.*

12. *Master and servant. Instruction on ratification of breach of contract of hiring by continuing in service held incorrect.*

In an action by an employer against another for hiring a servant before his contract of service expired, where the evidence for the defendant showed a breach of the contract by the employer prior to the hiring by the defendant, it was error to instruct for the plaintiff that, even though the jury may believe from the evidence that one or more of the servant's family were discharged without cause, or that the servant or members of his family were occasionally laid off without cause, and notwithstanding these facts the servants continued after such facts in the employment and worked under his contract, this constituted a ratification of the contract under its terms as originally made. *Ib.*

13. *Master and servant. Instruction on good faith as defense to charge of wrongful hiring held erroneously refused.*

Where an employer of a laborer brings an action against another for wrongful hiring of the servant of the plaintiff before the end of his term of service, and where the evidence for the defense shows, or tends to prove, that the employer breached his contract by discharging members of the servant's family, whose service is embraced in the contract, it is error to refuse the defendant an instruction to the effect that if the servant told the defendant that he and members of his family had been discharged and that plaintiff had told servant to take his boy and go to the farm, and that the defendant, in good faith, believed such statements were true at the time of the hiring the jury should find for the defendant, even though such statements were not true in fact. *Ib.*

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 INSURANCE.
 

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## INSURANCE.

1. *Fraternal benefit societies not governed by general law as to filing constitution, etc.*

Under chapter 206, Laws 1916, fraternal benefit societies are exempt from the provisions of section 2636, Code 1906 (Hemingway's Code sec. 5102), and the existing requirements in reference to filing with the Insurance Commissioner the constitution, by-laws, rules, and regulations of such societies, and penalties for a failure to so file them, are contained in the provisions of chapter 206, Laws 1916. *Sovereign Camp W. O. W. v. Garner*, 8.

2. *Fraternal benefit society's laws are of no force unless filed with Insurance Commissioner.*

Under the provisions of sections 12, 13, and 22 ch. 206, Laws 1916, the constitution, by-laws, rules and regulations, and amendments thereto, of every fraternal benefit society transacting business in this state must be filed with the Insurance Commissioner to give them validity in this state, and if such constitution and by-laws are not so filed, there has been no legal adoption thereof so far as the interests of policy holders in this state might be affected thereby, and they will not avoid or defeat any policy issued by such society in this state. *Ib.*

3. *Appeal and error. Where reasonable men may draw different conclusions from evidence, verdict not set aside; evidence showed insured railway mail clerk did not jump from car, but fell out.*

The jury is the judge of the credibility of the witnesses and the weight of the evidence; and where the facts and circumstances are such that reasonable men may draw different conclusions therefrom, the verdict of a jury will not be set aside as being insufficient to support a verdict. The facts in this case examined, and held sufficient to support the verdict. *Fraternal Aid Union v. White Lead*, 153.

4. *Constitution of benefit society that no officer or agent might alter, modify, or waive provisions held void.*

A provision in the constitution and by-laws of a benefit society that "no officer or member of the supreme lodge, except the supreme president by dispensation, nor any local or subordinate lodge or any officers or member thereof, or any organizer, deputy, or agent, shall have authority to change, alter, modify, or waive any of the provisions of this constitution," is void because a corporation, society, or individual cannot repeal the law of estoppel and waiver, and because said provision does not leave any officer or agent of the society who may act for it so as to bind it as to these subjects. *London Guarantee & Accident Co. v. M. C. Railroad Co.*, 97 Miss. 165, 52 So. 787.

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 INSURANCE.
 

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## INSURANCE—Continued.

5. *Representations in application not warranties when made on explanation of manager of society.*

Where a state manager of a benefit society whose powers are not limited by the by-laws of the society makes out an application for an applicant for a benefit certificate, and writes the answers to questions propounded to the applicant and interprets the meaning of such questions and writes answers after having the full facts explained to him by the applicant, the answers will not be held warranties so as to avoid the certificate issued thereon, even though not literally true. If they are not false, considered in the light of the facts made known to the agent, or if not false in the light of his explanations of the meaning and purpose of the questions asked, they will not avoid the policy or certificate. *Lewis Guarantee & Accident Co. v. M. C. Railroad Co.*, 97 Miss., 165, 52 So. 787.

6. *Delivery of policy by agent in violation of instructions to secure medical certificates held act of insurer.*

Where an insurance company executed a policy and sent it to an agent in this state to be delivered when the insured furnished a health certificate by one of its examining physicians, but no such provisions were in the policy, but in a letter of instructions, and the agent delivered the policy without complying with the instructions, the delivery by the agent is the act of the company, under 'section 2615, Code 1906 (section 5078, Hemingway's Code), and the policy is valid in the hands of the insured or his beneficiary, though no health certificate was furnished the agent or the company. *Mutual Life Ins. Co. v. Mangum*, 369.

7. *Insurer's liability depends on good health in fact where agent delivers policy without medical certificate; violation of rule by agent requiring medical certificate held not to invalidate policy.*

In such case where the policy stipulates that the policy should not be in effect unless the insured was in good health when the policy was delivered to and accepted by the insured, the question of liability depends upon the fact of good health, and if the insured was in fact in good health when it was delivered, it is not avoided because the company had a rule for the government of its agents that it should not be delivered without a medical examination by its examining physician, where more than sixty days had elapsed from the first examination, where such rule was not brought to the knowledge of the insured. 35.

8. *Delivery of receipt of premium in policy held conclusive against insurer in favor of beneficiary.*

Where an insurance policy recited on its face, "In consideration of the annual premium of Fifty and 10 100 dollars, the receipt of which is

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INSURANCE.

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## INSURANCE—Continued.

hereby acknowledged," such recital is more than a mere receipt; it is contractual, and is conclusive against the company in favor of the beneficiary so far as liability depends upon payment of the premium is concerned. It does not prevent the company from holding the insurer liable for the payment of the premium. The rule is that, as between the insured and the insurer for the purpose of collecting the premium, it is not conclusive but only *prima-facie* evidence of payment; but as between the beneficiary and the insurer it is conclusive, being contractual. *Ib.*

9. *Certificate provision that member's contract is governed by laws of society is binding if change made thereby is reasonable and before benefit becomes payable.*

A provision in an insurance certificate that the contract is governed by the laws of the society then in force or adopted thereafter is valid and binding upon the beneficiary, provided subsequent changes of contract are reasonable and made before benefit accrues. *Sov. Camp W. O. W. v. Miller*, 502.

10. *New limitation as to time for suit held void.*

Where a life insurance contract in a fraternal order is governed by the laws of the order then or afterwards adopted, the adoption in 1913 of a new constitution and code of laws by the order superseded all previous constitutions and laws, and a provision therein limiting the right to commence suit within one year from death of insured was prohibited by section 3127, Code of 1906 (Hemingway's Code, section 2491) and is void. *Ib.*

11. *Company held under no obligation to apply reserve on lapsed policy to extension thereof, in absence of demand.*

Under section 88, chapter 690, of the 1892 Session Laws of New York, an insurance company is under no obligation to apply the reserve on a lapsed life insurance policy to the extension of the policy, unless a demand therefor is made on the company, within six months after the lapsing of the policy. *Mutual Life Ins. Co. v. Batson*, 789.

12. *Injury to employee held not within "vessel hazard" clause of accident insurance contract.*

In an employer's accident insurance contract excluding liability for injury to employees of a packing plant received through "vessel hazard," where the employee was repairing an idle boat at plant premises and was injured by a kettle top in the plant building while on mission in connection with repairing the boat, such injury was not within the "vessel hazard" clause. *Employers' Liability Assur. Corp. v. Am. Packing Co.*, 874.

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INTOXICATING LIQUORS.

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## INSURANCE—Continued.

13. *Employee in designated class held covered where premium determined on estimated compensation of employees.*

In an employer's accident insurance contract an employee in a designated class is covered by the policy where the premium is to be determined and paid upon basis of estimated compensation of employees. *Employers' Liability Assur. Corp. v. Am. Packing Co.*, 874.

## INTOXICATING LIQUORS.

1. *The Eighteenth Amendment and the Volstead Act do not supersede or abrogate the existing state prohibition law.*

Since the prohibition laws of the state of Mississippi do not in any respect contravene the essential and dominant purpose of the Eighteenth Amendment to the Constitution of the United States, and since the power exercised by the state under chapter 189, Laws of 1918, is in support of the main object of such amendment, the National Prohibition Act, commonly known as the Volstead Act, passed in pursuance of the Eighteenth Amendment to the Constitution of the United States, does not supersede or suspend the said chapter 189, Laws 1918, and the jurisdiction of the state courts to enforce the provisions of said chapter is not affected by the fact that Congress has legislated upon the subject of prohibition. *Kysar v. State*, 79.

2. *Eighteenth Amendment and Volstead Act do not supersede or abrogate existing state prohibition law.*

Since the prohibition laws of the state of Mississippi do not in any respect contravene the essential and dominant purpose of the Eighteenth Amendment to the Constitution of the United States, and since the power exercised by the state under chapter 189, Laws of 1918, is in support of the main object of such amendment, the National Prohibition Act, commonly known as the Volstead Act, passed in pursuance of the Eighteenth Amendment to the Constitution of the United States, does not supersede or suspend the said chapter 189, Laws 1918, and the jurisdiction of the state courts to enforce the provisions of said chapter is not affected by the fact that Congress has legislated upon the subject of prohibition. *Meriwether v. State*, 435.

3. *Jamaica ginger is "spirituous" or "vinous liquor" within act imposing penalties for sale.*

Chapter 256, Laws 1912, imposing penalties to be recovered in a civil action where the sale or giving away of "spirituous" or "vinous" liquors is permitted, embraces preparations of whatever name, containing alcohol in large quantities, which are sold as beverages. It applies to Jamaica ginger, which contains only pure alcohol and the essence of ginger, where it is sold as a beverage and not as a medicine.

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JUDGES—JUDGMENT.

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## INTOXICATING LIQUORS—Continued.

*Lemly v. State*, 70 Miss. 241, 12 South, 22, 20 L. R. A. 645, distinguished (citing Words and Phrases, Spirituous Liquors). *Payne v. State et al.*, 896.

## JUDGES.

*Relationship to attorney not a disqualification; suggestion of disqualification must be made before trial unless knowledge acquired subsequently.*

Under section 165 of the state Constitution of 1890, a judge is not disqualified to sit in a case pending before him merely because he is related to an attorney in the case. To constitute disqualification the attorney related to the judge must be interested in the subject-matter, or *res* of the suit. A party desiring to suggest the disqualification of a judge in a case must do so before the trial of the case, unless his knowledge of the facts of disqualification was acquired subsequent to the trial of the case. *Shireman et al. v. Wildberger et al.*, 499.

## JUDGMENT.

1. *Appeal and error. Supreme Court judge has power to grant appeals with supersedeas from judgment establishing lost record.*

A judge of the supreme court has power, under section 4908, Code 1906 (section 3186, Hemingway's Code), to grant an appeal with *supersedeas* to the supreme court from a final judgment of a circuit court establishing a lost record of such court. *Belzoni Land Co. v. Robertson*, 338.

2. *Appeal and error. Judgment, establishing lost record, from which appeal with supersedeas pending, not admissible in another suit as evidence.*

The record of a court, which has been lost and which has been re-established under section 3173, Code of 1906 (section 2514, Hemingway's Code), and from which judgment re-establishing it an appeal with *supersedeas* has been prosecuted to the supreme court and is pending, cannot be used in evidence in another suit pending such appeal. The effect of the *supersedeas* is to prevent the use of the judgment during the time it is superseded. The judgment appealed from lies dormant, and no action can be taken which depends upon the judgment for its validity. *McConnico v. State*, 107 Miss. 265, 65 So. 243, cited. *Ib.*

3. *Filing bill to cancel title acquired under vendor's lien foreclosure held a direct and not a collateral attack.*

Where a bill was filed to cancel a title acquired under a vendor's lien foreclosure suit in which it was alleged that such judgment was void for many reasons set forth in the bill, and where the former pleadings

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 JURISDICTIONS.
 

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## JUDGMENT—Continued.

and proceedings were attached as exhibits to the bill, and where it was alleged that the complainants, who were minor defendants in the former suit, did not have notice in said former suit, such attack is a direct attack and not a collateral attack, although the complainant in the former suit was not made a defendant in the last suit; it being alleged that the complainant in the former suit was paid in full before the decree was rendered in the first suit. *Belt et al. v. Adams*, 387.

4. *Adjudication of United States Circuit Court of Appeals on surety's liability under appeal bond res adjudicata as against further recovery in state court.*

Where an appeal bond has been executed under an order of a judge of the United States district court, in a cause there pending, granting a writ of error to the United States circuit court of appeals, and thereafter the United States circuit court of appeals has proceeded to judgment on the bond, and has expressly adjudicated the extent of the liability of the surety on the bond the judgment of such appellate court is *res adjudicata* of all further liability on the bond, and an additional award against the surety thereon cannot be recovered in a state court. *National Surety Co. v. Lee*, 517.

5. *Garnishment. Judgment against garnishee extinguished on reversal of main judgment.*

A judgment against a garnishee is incidental to, and dependent upon, the main judgment, and cannot stand where the judgment in the main action has been annulled by reversal. *Moody & Williams v. Dye et al.*, 770.

6. *Suit to restrain execution of judgment against garnishee direct attack.*

Where a judgment against a garnishee is extinguished by the annulment of the main judgment, the garnishee may enjoin execution of the judgment against him; such attack being direct and not collateral. *Ib.*

7. *Offer of equity unnecessary before garnishee may have relief against extinguished judgment.*

Where a judgment against a garnishee has become invalid because the judgment in the main action has been annulled by reversal, it is not incumbent upon the garnishee to offer to do equity to the assignee of the judgment before he is entitled to relief against the extinguished garnishment judgment. *Ib.*

## JURISDICTIONS.

1. *Intoxicating liquors. The Eighteenth Amendment and the Volstead Act do not supersede or abrogate the existing state prohibition law.*

Since the prohibition laws of the state of Mississippi do not in any

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JURY.

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## JURISDICTIONS—Continued.

respect contravene the essential and dominant purpose of the Eighteenth Amendment to the Constitution of the United States, and since the power exercised by the state under chapter 189, Laws of 1918, is in support of the main object of such amendment, the National Prohibition Act, commonly known as the Volstead Act, passed in pursuance of the Eighteenth Amendment to the Constitution of the United States, does not supersede or suspend the said chapter 189, Laws 1918, and the jurisdiction of the state courts to enforce the provisions of said chapter is not affected by the fact that Congress has legislated upon the subject of prohibition. *Kysar v. State*, 79.

2. *Intoxicating liquors. Eighteenth Amendment and Volstead Act do not supersede or abrogate existing state prohibition law.*

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## JURY.

1. *Court may propound questions to jurors, but parties must be allowed to further examine them for peremptory challenge.*

In impaneling jury, questions propounded through the court is proper practice, but opportunity must be offered defendant to further question jury, through the court, for purpose of peremptory challenge. *Funches v. State*, 141.

2. *Appeal and error. Insurance. Where reasonable men may draw different conclusions from evidence, verdict not set aside; evidence showed insured railway mail clerk did not jump from car, but fell out.*

The jury is the judge of the credibility of the witnesses and the weight of the evidence; and where the facts and circumstances are such that reasonable men may draw different conclusions therefrom, the verdict of a jury will not be set aside as being insufficient to support a verdict. The facts in this case examined, and held sufficient to support the verdict. *Fraternal Aid Union v. Whitehead*, 153.

3. *Master and servant. Master's knowledge of defective car step held for jury.*

Where a lumber company undertook to transport its employees on its

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 LANDLORD AND TENANT.
 

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## JURY—Continued.

trains to and from their work in the woods, and one of the steps of a car which was furnished for that purpose was twisted or bent, and there was evidence that the company did not maintain any system of inspection of such cars while in use in the woods, under the facts in evidence, it was a question for the jury as to whether the defendant knew, or by the exercise of reasonable care and diligence could have known, of the defect in the step. *Tallahala Lumber Co. v. Holliman*, 309.

## LANDLORD AND TENANT.

1. *Stipulation for attorney's fee in rent note not enforceable in attachment for rent.*

Where a tenant gives a rent note which contains an agreement to pay an attorney's fee in case the note is not paid at maturity, and it is placed in the hands of an attorney, and where an attachment for rent is sued out, followed by replevin and trial in accordance with statutory proceedings, at attorney's fee cannot be allowed in such suit to the landlord. The statute giving the landlord a lien and providing for proceedings to enforce it does not include an attorney's fee, and the products grown by the tenant are not impressed with a lien for an attorney's fee, though stipulated for in the rent note, and the allowance of an attorney's fee in such case constitutes reversible error. *O'Keefe et al. v. McLemore*, 394.

2. *Evidence. Parol evidence not admission to vary deed conveying leased premises without reserving rent.*

Where a landlord conveys the leased premises by deed without reserving the rent in the deed, the rent passes to the grantee, and parol evidence is not admissible to show oral understandings and agreements between the parties contrary to the legal effect of the deed. *Ib.*

3. *Frauds, statutes of. Verbal lease, constituting completed contract, held not unenforceable under statute.*

A lessee, who has entered into possession of land under a verbal lease which was not to be performed within one year and has completed the contract, is liable for the rent; and when a lessor has exercised a contractual right to terminate a verbal lease at the end of a yearly period, this constitutes the lease a completed contract, and the mere failure to discharge mutual monetary obligations on a verbal contract otherwise completed does not render such contract unenforceable under the statute of frauds. *Fronkling v. Berry*, 763.

4. *War. Alien enemy may defend and hence may recover property distrained.*

A proceeding to recover property which has been seized under a distress for rent is essentially defensive in its nature, and an alien enemy,

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LANDS AND LAND TITLES.

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## LANDLORD AND TENANT—Continued.

whose property has been seized under a distress for rent, may maintain the statutory proceedings to recover the property and assert such defensive rights as he may have under the lease. *Ib.*

## LANDS AND LAND TITLES.

1. *Railroads. Effect of consolidation on right of way over school section stated.*

When the Yazoo & Mississippi Valley Railroad Company created by the Laws of 1882, chapter 541, page 838, consolidated with the Louisville, New Orleans & Texas Railroad Company, the effect was to create a new corporation subject to the existing laws of state; and under section 211 of the state Constitution of 1890 the fee in the sixteenth section lands which had not then passed could not thereafter become vested in a corporation or an individual; and a right of way laid out after such consolidation, which occurred in October, 1892, over sixteenth section lands, did not vest any right or title to said sixteenth section lands under section 7 of the Charter of the original Yazoo & Mississippi Valley Railroad Company. *Yazoo & M. V. R. Co. v. Sunflower County*, 92.

2. *Public lands. Railroad lessee of school section holding over after expiration of lease estopped to set up adverse claim.*

Where a railroad company, after the Constitution of 1890 went into operation, leased from a board of supervisors a right of way for a term of years, and under such lease constructed its right of way and track across the sixteenth section lands held in trust by the state, and continued in possession after the expiration of its lease without giving notice of its intention to claim title and without surrendering possession of the said right of way, it cannot under such facts set up an adverse claim to the county's reversion and assert a hostile title. *Ib.*

3. *Adverse possession. Adverse occupation of railroad right of way for ten years gives title.*

Where a stranger in title to a railroad company obtains adverse, open, notorious, and exclusive possession of a part of its right of way and so occupies it for a period of ten years, claiming it as his own, he thereby obtains title by adverse possession. *Mobile & O. R. Co. v. Strain*, 697.

4. *Adverse possession. User of railroad right of way and cultivation of garden under claim of title gives title after ten years.*

Where the owner of railroad fences in a part of a railroad right of way immediately adjoining his property and continuously uses it and cultivates it as a garden, claiming title thereto, and has exclusive

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 LAWS CITED AND CONSTRUED.
 

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## LANDS AND LAND TITLES—Continued.

possession of it for a period of ten years, he acquired title thereto by adverse possession. *Mobile & O. R. Co. v. Strain*, 697.

5. *Adverse possession. Permission use of right of way personal, and permission ceases when permitted party sells his adjoining property in connection with which permission given.*

Where the owner of a hotel by permission fences an adjoining lot which is a part of the right of way of a railroad company, this permissive use of the right of way is personal and ceases when the hotel is sold; and title by adverse possession may be obtained of this lot by remote grantees of the property by exclusive, open, notorious, and adverse possession thereof under claim of title for a period of ten years. This possession is constructive notice of their adverse claim to the railroad company. *Ib.*

6. *Adverse possession. Title may be obtained to part of railroad right of way not necessary to business as common carrier.*

Section 184 of the Constitution of 1890 makes railroads public highways. Title by adverse possession may be acquired of a part of its right of way not in actual use, and not necessary for the transaction of its business as a common carrier. *Ib.*

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 LAWS CITED AND CONSTRUED.
 

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- Ch. 28, Ex. Sess. (1917). Counties. Validity of bond issue cannot be questioned after validation under statute, although issued without authority. *Parker v. Board of Sup'rs of Grenada County*, 617.
- Ch. 28, Ex. Sess. (1917) Schools and school districts. In proceedings to validate bond issue, legality of district cannot be inquired into beyond record of organization. *Lincoln County v. Wilson et al.*, 837.
- Ch. 40 (1898). Public lands. Board of supervisors cannot superimpose on a seven-year lease of sixteenth section land an option to release at a stipulated rental. *McPherson et al. v. Richards et al.*, 219.
- Ch. 100 (1916). Taxation. Exemption of factories includes property necessary to operation only; "manufacturing plant." *Adams County v. National Box Co.*, 598.
- Ch. 100 (1916). Taxation. Exemption statutes strictly construed against exemptions; exemption statute construed; raw materials and finished products not part of factory exempted. *Adams County v. National Box Co.*, 598.
- Ch. 135 (1910). Master and servant. Negligence as to employee boarding car with defective step and his contributory negligence held

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 LAWS CITED AND CONSTRUED.
 

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## LAWS CITED AND CONSTRUED—Continued.

- for jury. Negligence. Employee boarding moving train held guilty of contributory negligence requiring diminution of damages. *Tallahala Lumber Co. v. Holliman*, 308.
- Ch. 145 (1912). Highways. Highway commissioners held to have no control over funds derived under statute. *Shell et al., Com'rs. v. Monroe County*, 562.
- Ch. 176 (1914). Bridges. Supervisors' failure to use certain fund held not to invest highway commissioners or taxpayers with right to recover money paid from special fund. *Shell et al., Com'rs v. Monroe County*, 562..
- Ch. 176, Sec. 5, (1914). Highways. Commissioners have no authority to let contracts until engineer's survey and estimate adopted and ratified. *Ellis et al. v. Tellman et al.*, 678.
- Ch. 189 (1918). Intoxicating liquors. The Eighteenth Amendment and the Volstead Act do not supersede or abrogate the existing state prohibition law. *Kysar v. State*, 79.
- Ch. 189 (1918). Intoxicating liquors. Eighteenth Amendment and Volstead Act do not supersede or abrogate existing state prohibition law. *Meriwether v. State*, 435.
- Ch. 206 (1916). Insurance. Fraternal benefit societies not governed by general law as to filing constitution, etc. *Sovereign Camp W. O. W. v. Garner*, 8.
- Ch. 206 Sec. 12, 13 & 22, (1916). Insurance. Fraternal benefit society's laws are of no force unless filed with Insurance Commissioner. Evidence. When certified copy of law of fraternal benefit order is introduced burden is on other party to show it had not been filed. *Sovereign Camp W. O. W. v. Garner*, 8.
- Ch. 207 (1920). Schools and school districts. Date of resolution for issue of bonds of consolidated district held not to render issue void. *Lincoln County v. Wilson et al.*, 837.
- Ch. 214 Sec. 7 (1912). Criminal law. Evidence insufficient to show conviction of prior offenses under statute. *Williams v. State*, 347.
- Ch. 214, sec. 1 (1912). Criminal law. Punishment as for first conviction only held warranted. *Williams v. State*, 347.
- Ch. 217 (1916). Bail. If convicted person is ready to give bail on appeal, it is error to commit him to jail: violation of statute for protection of female children against insult bailable. *Crosby v. State*, 433.
- Ch. 256 (1912). Intoxicating liquors. Jamaica ginger is "spirituous" or "vinous liquor" within act imposing penalties for sale. *Payne v. State et al.*, 896.

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 LIABILITY.
 

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## LAWS CITED AND CONSTRUED—Continued.

- Ch. 260, sec. 23 (1912). Municipal corporations. Property owner held liable for interest on legal item of assessment from time assessment made final. *Buckley et al. v. City of Jackson*, 780.
- Ch. 257, 262 (1916). Courts. Act fixing term of chancery court held not repealed. *Weaver v. Turner*, 250.
- Ch. 541, (1882). Railroads. Effect of consolidation on right of way over school section stated. *Yazoo & M. V. R. Co. v. Sunflower County*, 92.

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 LIABILITY.
 

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1. *Schools and school districts. State agent administering trust fund for educational purpose under state law not personally liable to cestui que trust for diversion resulting from compliance with law.*

When the agent or officer of a state charged by its laws with the duty of administering a fund held in trust by the state for educational purposes, administers it in accordance with the laws passed by the Legislature of the state for that purpose, he is not personally liable to the cestui que trust for any diversion of the trust fund which may result because of his having disposed of it as he was directed by law so to do. *City of Corinth v. Robertson*, 31.

2. *Schools and school districts. Neither municipal treasurer nor district liable for diversion of interest on Chickasaw school fund where administered according to law.*

The treasurer of a municipality constituting a separate school district in receiving and disbursing the interest of the Chickasaw school fund apportioned to the separate school district under the laws of the state for the maintenance of its public schools acts as the state's agent, and if he complies with the law in making the disbursement, neither he nor the municipality can be held liable for any diversion of such interest from the use for which the fund is held by the state, which may thereby result from the method adopted by the state for administering the trust. *Ib.*

3. *Libel and slander. Request by ex-employee held to release employer from liability on account of information furnished.*

In a libel suit by an ex-employee of a railroad company against such company based upon a statement to a prospective employer in response to a letter written by plaintiff to defendant to forward to a prospective employer information about plaintiff's personal character, habits, and ability and as to the cause of his leaving their employment, such information furnished in response to such letter cannot form the basis of a libel suit, where it expressly released defendant

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LIABILITY.

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## LIABILITY—Continued.

from liability for damages on account of furnishing such information. *Burdett v. Hines*, 66.

4. *Appeal and error. Damages for loss of arm held grossly inadequate; where damages inadequate; judgment will be reversed only as to amount.*

Where, in a suit for damages by a laborer against his employer, the jury found that the injury was the result of the negligence of defendants, the verdict of the jury awarding plaintiff the sum of three hundred dollars as compensation for his suffering and for the loss of an arm is grossly inadequate, and the court on appeal will reverse the judgment of the lower court in so far as it adjudges the amount of damages to be recovered, but will allow the judgment as to liability to stand. *McLaughlin v. R. W. Pagan-Peel Co. et al.*, 116.

5. *Brokers. Expenses incurred by owner's authority in canceling leases, recoverable, though no commission allowed.*

While no commissions are recoverable by a broker, where they are based on the amount received for the land by the owner, and the sale has failed through no fault of the owner, the broker may nevertheless recover expenses incurred by the owner's authority in securing options to cancel leases to enable the owner to deliver possession to the prospective buyer. *Lee v. Greenwood Agency Co.*, 177.

6. *Brokers. When broker knows of defect in title, undertaking is to sell what owner has; owner bound to disclose facts which would clear title.*

Where a real estate agent undertakes to make a sale of a piece of property knowing that title is defective, he undertakes, in effect, to sell what the owner has, provided the defect in such as cannot with reasonable effort be overcome by the owner. In such case it is the duty of the owner to make reasonable effort to perfect the title, and, if that may be done by disclosing facts within his knowledge that might remove the difficulty and he fails to do so, the owner cannot escape the payment of fees or commissions earned by the agent in bringing buyer and seller together on terms agreed on. *Shireman et al. v. Wildberger et al.*, 199.

7. *Sunday. Owner not relieved of liability to broker because of signing contract on Sunday.*

Where a principal and agent made a contract on a secular day by which the agent agreed to sell real estate for the principal on given terms, and such agent on secular days procures a purchaser and drafts a written contract, which the principal modifies and signs on Sunday,

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 LIABILITY.
 

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## LIABILITY—Continued.

and which the agent on a secular day gets the purchaser to accept the sign on a secular day, the principal cannot escape liability for paying the agent's commission earned because of the fact that the principal signed the contract on Sunday. *Shireman et al. v. Wildberger et al.*, 199.

8. *Bailment. Limitation on liability must be brought to owner's attention by bailee of baggage.*

Where baggage is checked by a company and the same is lost, the company is liable for its loss, and any contract limiting the liability of the company must be brought to the attention of the owner. *Van Noy Interstate Co. v. Tucker*, 260.

9. *Master and servant. Relation not served by employee's act in attempting to board moving train.*

Where a lumber company was transporting its employees on its train from their work in the woods to the camp, and an employee who was a member of the track crew was called from the train by a signal given by his foreman after the train had stopped on account of some defect in the locomotive, and the employee interpreted this signal to mean that track work was necessary to be done ahead, and then left the train and followed his foreman down the track to a point at or near the front of the locomotive, and the train then started forward toward the camp, and the employee attempted to board the train as it passed him and was injured, *held*, that the act of the employee in endeavoring to board the moving train, where he had a right to ride, was not an abandonment of the master's business and did not sever the relation of master and servant. *Tallahala Lumber Co. v. Holliman*, 308.

10. *Insurance. Insurer's liability depends on good health in fact where agent delivers policy without medical certificate; violation of rule by agent requiring medical certificate held not to invalidate policy.*

In such case where the policy stipulates that the policy should not be in effect unless the insured was in good health when the policy was delivered to and accepted by the insured, the question of liability depends upon the fact of good health, and if the insured was in fact in good health when it was delivered, it is not avoided because the company had a rule for the government of its agents that it should not be delivered without a medical examination by its examining physician, where more than sixty days had elapsed from the first examination, where such rule was not brought to the knowledge of the insured. *Mutual Life Ins. Co. v. Vaughan*, 369.

11. *Insurance. Acknowledgment of receipt of premium in policy held conclusive against insurer in favor of beneficiary.*

Where an insurance policy recited on its face, "In consideration of the

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LIABILITY.

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## LIABILITY—Continued.

annual premium of Fifty and 10/100 dollars, the receipt of which is hereby acknowledged," such recital is more than a mere receipt; it is contractual, and is conclusive against the company in favor of the beneficiary so far as liability depends upon payment of the premium is concerned. It does not prevent the company from holding the insurer liable for the payment of the premium. The rule is that, as between the insured and the insurer for the purpose of collecting the premium, it is not conclusive but only *prima-facie* evidence of payment; but as between the beneficiary and the insurer it is conclusive, being contractual. *Ib.*

12. *Master and servant. Assault on servant by another servant in course of employment actionable.*

Where a master employs a dangerous, quarrelsome, and vicious servant, or retains him in his service after knowledge of his dangerous character, and such servant, while in the course of his employment and in furtherance of the master's business, commits an assault on another servant, who is also employed in the master's business and is acting in furtherance of the master's business, the master is liable for the injuries resulting from the wrongful assault. *Hines Agent v. Green*, 476.

13. *Master and servant. Railroad engineer's assault on conductor held actionable.*

Where a conductor of a switching crew, including an engineer, was engaged in moving an engine and passenger cars from one point in the yard to another point therein, and where to complete the movement it is necessary to pass through a switch, and where the engine was halted because the switch was not thrown, and the engineer because of such fact assaults the conductor because the switch is not thrown, so that the engine may proceed to its destination, and where it was the conductor's duty to have the switch thrown, the engineer and the conductor are acting in the course of their employment, about the master's business, and the master is liable for a wrongful assault by the engineer on the conductor. *Ib.*

14. *Commerce. Rule for determining applicability of federal Employers' Liability Act stated; federal Employers' Liability Act held inapplicable to action for assault upon railroad employee by engineer.*

When applicability of the federal Employers' Liability Act (U. S. Comp. St., sections 8657-8665) is involved, or it is to be determined in a suit whether it is applicable or not, it may generally be determined by inquiring whether at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as, practically, to be a part of it. The facts in this case do not

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 LIABILITY.
 

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## LIABILITY—Continued.

bring it within this rule as the cars being switched neither carried interstate commerce nor were they to be used immediately in interstate commerce, nor had they been used immediately before in such commerce, but were only used therein whenever the exigencies of the railroad called them into service for that purpose. *Hines Agent v. Green*, 476.

15. *Judgment. Adjudication of United States Circuit Court of Appeals on surety's liability under appeal bond res adjudicata as against further recovery in state court.*

Where an appeal bond has been executed under an order of a judge of the United States district court, in a cause there pending, granting a writ of error to the United States circuit court of appeals, and thereafter the United States circuit court of appeals has proceeded to judgment on the bond, and has expressly adjudicated the extent of the liability of the surety on the bond, the judgment of such appellate court is *res adjudicata* of all further liability on the bond, and an additional award against the surety thereon cannot be recovered in a state court. *National Surety Co. v. Lee*, 517.

16. *Carriers. Carrier not required to accept unattended child of tender years, but, if it does so, is liable for neglect of duty; if carrier seeks to limit ticket agent's power to contract, limitations must be posted or brought to passenger's attention.*

The carrier of passengers is not required to accept, unattended, a child of tender years needing special attention, but it may do so, and, if it does, it is liable for injury caused by its neglect of duty. The ticket agent generally has power to make contracts for the carrier for the carriage of passengers, and such contracts are within the scope of his apparent duties. If the carrier seeks to limit his powers, it must have its rules limiting the agent's powers posted in its passenger depots, or else it must call the passenger's attention to the limitation, or bring it to his attention, to prevent liability for breach of a special contract by its ticket agent. *Wasoo & M. V. R. Co. v. O'Keefe*, 536.

17. *Carriers. Instructions as to liability for carrying child past destination in violation of special contract held not erroneous.*

In a suit for damages for failure to put a child off at its destination, under a special contract so to do, to instruct the jury that, if the jury believed the ticket agent agreed that the conductor would put the child off at its destination, and that the conductor promised the same thing, and if they believed that it was within the scope of the authority of these employees to bind the railroad company by an agreement or promise made by the conductor and ticket agent, that then the defendant would be liable for the conductor's failure to put the child off, is not erroneous, where the evidence sustains such facts. The fact

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LIABILITY.

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## LIABILITY—Continued.

that the conductor was without authority to make a special contract would be immaterial, where the ticket agent had such power and did make such contract. It merely imposed on the plaintiff the necessity of proving more than was needed under the law, it being sufficient to prove that the ticket agent had power to and did make such contract, and that the carrier breached its duty thereunder. *Ib.*

18. *Carriers. Initial carrier's liability ends on delivery to interstate point designated in its bill of lading.*

When the initial carrier issues the bill of lading, by the terms of which it undertakes to deliver the interstate shipment at a certain place, its contract is performed when it delivers the shipment in good order at the designated place, and it is not liable, under the Carmack Amendment (U. S. Comp. St., sections 8604-a, 8604aa), for damage to the shipment while it is being transported by another railroad company to some other point under a bill of lading issued by the other company to the owner of the property. *Yazoo & M. V. R. Co. v. Norman*, 636.

19. *Warehousemen. Warehousemen storing goods in place different from that agreed on does so at his own risk.*

Where a warehouseman has contracted to store goods in a particular place, and breaches his contract and stores them in a different place, it is at his own risk, and he is liable for any damage or injury to the goods which occurs, even without his fault or negligence. *Tallahatchie Compress & Storage Co. v. Hartshorn*, 662.

20. *Animals. Statute imposes absolute liability on owner of trespassing stock.*

Under the stock law contained in chapter 50, Code of 1906 (chapter 102, Hemingway's Code), the owners of the domestic animals therein named are required to fence such animals against the crops, and crops may be cultivated on unclosed lands; and section 2222, Code of 1906 (section 4541, Hemingway's Code), being part of said stock law, makes the owner of trespassing stock absolutely liable for damages done by them to the crops of others, and questions of due care and negligence in confining stock are eliminated. *Minor v. Dockery*, 727.

21. *Animals. Agent in control of trespassing stock not liable for damages.*

A mere agent in control of the cattle, horses and mules belonging to his principal is not liable for damages done by such animals in trespassing upon the crops of another, under the principle that an agent is liable to no one except his principal for damages resulting from an omission or neglect of duty in respect to the business of the agency. *Ib.*

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LIABILITY.

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## LIABILITY—Continued.

22. *Carriers. Agent's failure to specify all articles in bill of lading held waiver of nonliability clause.*

Where a shipper carries articles of freight to a freight agent of a railroad company in charge of its business, and discloses the nature and value of the articles to be shipped by freight, and such agent writes only one article in the bill of lading when the shipment contains many articles, the company cannot escape responsibility for the negligence or dishonesty of its employees because the bill of lading contains a clause that "no carrier will be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariff, unless a special agreement to do so and the stipulated value of the articles are indorsed hereon." Where the information is furnished the agent in charge, and he fails to write the data on the bill of lading, it must be treated as having waived the provision. *Illinois Cent. R. Co., v. King*, 734.

23. *Municipal corporations. Property owner held liable for interest on legal item of assessment from time assessment made final.*

Where a front-foot assessment is made against a city property owner under chapter 260, Laws of 1912, as amended by chapter 256, Laws of 1914 (Hemingway's Code, sections 5941 to 5965, inclusive), and such assessment is composed of charges for different items of improvement, and the property owner contests the assessment in the courts and succeeds in having all the items of assessment declared illegal except one, he is still liable for interest on that item under section 23 of said chapter 260, Laws of 1912, as amended by chapter 256, Laws of 1914 (Hemingway's Code, section 5963), from the time the assessment was made final. *Buckley et al. v. City of Jackson*, 780.

24. *Municipal corporations. By tendering amount due on legal item of assessment, property owner may escape liability for interest.*

In such case the only manner in which the property owner could save himself from interest on the item finally held to be legal would have been to concede its legality and make a tender of the amount. *Ib.*

25. *Principal and surety. Employer bound to report only facts justifying charge of larceny or embezzlement under indemnity bond.*

Where a surety company has executed a bond indemnifying an employer against loss by reason of any act of an employee constituting larceny or embezzlement, under a provision of the bond requiring the employer to give written notice to the company immediately upon becoming aware of any loss which might be made the basis of a claim thereunder, the employer is not bound to report his suspicions arising from unexplained irregularities or discrepancies in the books or accounts of the employee, but notice is only required after the em-

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LIBEL AND SLANDER—LIENS.

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## LIABILITY—Continued.

ployer has knowledge of such facts as would justify the charge of larceny or embezzlement. *Maryland Casualty Co. v. Hall*, 792.

26. *Principal and surety. Surety under indemnity bond not liable for sums owing to employer by employee discharged by improper use of employer's other funds.*

Under an employer's indemnity bond, providing that the company shall not be liable thereunder for any sum owing to the employer by the employee at the commencement of the term of the bond, or for any money thereafter used directly or indirectly by the employee to discharge in whole or in part any debt or obligation contracted or incurred by the employee with the employer before or during the term of the bond, the surety company is not liable for any sum which was owing to the employer at the commencement of the bond, and which the employee attempted to discharge by the improper use of other funds of the employer. *Ib.*

27. *Insurance. Injury to employee held not within "vessel hazard" clause of accident insurance contract.*

In an employer's accident insurance contract excluding liability for injury to employees of a packing plant received through "vessel hazard," where the employee was repairing an idle boat at plant premises and was injured by a kettle top in the plant building while on mission in connection with repairing the boat, such injury was not within the "vessel hazard" clause. *Employers Liability Assur. Corp. v. Am. Pac. Co.*, 874.

## LIBEL AND SLANDER.

- Request by ex-employee held to release employer from liability on account of information furnished.*

In a libel suit by an ex-employee of a railroad company against such company based upon a statement to a prospective employer in response to a letter written by plaintiff to defendant to forward to a prospective employer information about plaintiff's personal character, habits, and ability and as to the cause of his leaving their employment, such information furnished in response to such letter cannot form the basis of a libel suit, where it expressly released defendant from liability for damages on account of furnishing such information. *Burdett v. Hines, et al.*, 66.

## LIENS.

1. *Attachment. Lien exists only when property seized; lien does not relate back to filing of bill.*

An attachment lien does not arise from the filing of a bill, but only

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LIMITATIONS OF ACTIONS—MANDAMUS.

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## LIENS—Continued.

exists when the property is seized. It does not relate back to the date of the filing of the bill, but dates from the seizure under the writ. *Slattery v. P. L. Renonet Lumber Co.*, 229.

2. *Highways. Balance due contractor not subject to lien under statute by filing claim with board of supervisors.*

The public roads and property of a county are not subject to the lien created under section 3074, Code of 1906 (Hemingway's Code, section 2434), in favor of laborers and subcontractors, and by filing with the board of supervisors a notice, claiming a lien on the balance in the hands of the county authorities to the credit of the principal contractor of such roads, a subcontractor can acquire no lien on such balance. *McGraw v. Board of Sup'rs*, 421.

## LIMITATIONS OF ACTIONS.

*Limitations may be set up by person entitled, and is not available by mere licensee of such person.*

As a general rule, the statute of limitation is personal to the person entitled to plead it, and cannot be set up by a third person who has acquired no property interest in the property. It is not available by a mere licensee of a person who might claim thereunder, but has not done so. *Alabama & V. Ry. Co. v. Joseph*, 454.

## LIS PENDENS.

*See ATTACHMENT.*

## LOGS AND LOGGING.

*Timber held to revert to vendors upon impossibility of performance of contract.*

In a timber contract providing that, if at any time it becomes impossible for vendees to cut the timber, it would revert to vendor, the contract becomes invalid, and the reversion arises when it appears that it was impossible for vendees' assignee to cut the timber within a reasonable time, in the manner stipulated. *Adams v. Young et al.*, 748.

## MANDAMUS.

*Highways. Adjudicated balance due road contractor assignable; assignee of road contractor may compel issuance of warrant for balance on contract.*

When a contractor has construed public roads in a county or subdivision thereof, and such roads have been completed and accepted, and the balance due such contractor for the construction of the roads has been finally adjudicated by the board of supervisors, and there only

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MASTER AND SERVANT.

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## MANDAMUS—Continued.

remains the duty of ordering the issuance of a warrant for this balance, the contractor may assign this balance due to him, and the assignee thereof may maintain mandamus to compel the board of supervisors to issue to him a warrant for the balance so assigned. *McGraw v. Board of Sup'rs*, 421.

## MASTER AND SERVANT.

1. *Relation not served by employee's act in attempting to board moving train.*

Where a lumber company was transporting its employees on its train from their work in the woods to the camp, and an employee who was a member of the track crew was called from the train by a signal given by his foreman after the train had stopped on account of some defect in the locomotive, and the employee interpreted this signal to mean that track work was necessary to be done ahead, and then left the train and followed his foreman down the track to a point at or near the front of the locomotive, and the train then started forward toward the camp, and the employee attempted to board the train as it passed him and was injured, *held*, that the act of the employee in endeavoring to board the moving train, where he had a right to ride, was not an abandonment of the master's business and did not sever the relation of master and servant. *Tallahala Lumber Co. v. Holliman*, 308.

2. *Master's knowledge of defective car step held for jury.*

Where a lumber company undertook to transport its employees on its trains to and from their work in the woods, and one of the steps of a car which was furnished for that purpose was twisted or bent, and there was evidence that the company did not maintain any system of inspection of such cars while in use in the woods, under the facts in evidence, it was a question for the jury as to whether the defendant knew, or by the exercise of reasonable care and diligence could have known, of the defect in the step. *Ib.*

3. *Negligence as to employee boarding car with defective step and his contributory negligence held for jury.*

Under Acts 1910, chapter 135 (Hemingway's Code, Section 502 and 503), providing that contributory negligence shall not bar a recovery, when the step of a flat car, which has been furnished by the defendant company for the purpose of transporting its employees to and from their work, was twisted or bent, and an employee was injured in attempting to use this bent step in boarding the train while moving, *held*, that, under the facts in evidence, it was a question for the jury as to whether, in furnishing a car with a defective step, the defendant was

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MASTER AND SERVANT.

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## MASTER AND SERVANT—Continued.

guilty of negligence which contributed to the injury, and that all questions of negligence and contributory negligence were properly submitted to the jury. *Tallahala Lumber Co. v. Holliman*, 308.

4. *Cleaning machine in motion, held proximate cause of injury.*

Where a master has provided a perfectly safe contrivance by which machinery might be started or stopped at will, and an employee, who was in sole charge of the operation of the machinery, started it in motion, and then without necessity undertook to clean it while it was in motion, and as a consequence was injured, the act of the employee in selecting a highly dangerous method of performing a duty when a perfectly safe method was equally available was the proximate and sole cause of the injury. *Buckeye Cotton Oil Co. v. Saffold*, 407.

5. *Assault on servant by another servant in course of employment actionable.*

Where a master employs a dangerous, quarrelsome, and vicious servant, or retains him in his service after knowledge of his dangerous character, and such servant, while in the course of his employment and in furtherance of the master's business, commits an assault on another servant, who is also employed in the master's business and is acting in furtherance of the master's business, the master is liable for the injuries resulting from the wrongful assault. *Hines, Agent v. Green*, 476.

6. *Railroad engineer's assault on conductor held actionable.*

Where a conductor of a switching crew, including an engineer, was engaged in moving an engine and passenger cars from one point in the yard to another point therein, and where to complete the movement it is necessary to pass through a switch, and where the engine was halted because the switch was not thrown, and the engineer because of such fact assaults the conductor because the switch is not thrown, so that the engine may proceed to its destination, and where it was the conductor's duty to have the switch thrown, the engineer and the conductor are acting in the course of their employment, about the master's business, and the master is liable for a wrongful assault by the engineer on the conductor. *Ib.*

7. *Risk of railroad's negligence not assumed.*

Under the laws of this state the servant does not assume the risk, in cases against railroad companies, where the master is negligent. *Ib.*

8. *"Willfully entice away or knowingly employ" servant implies actual knowledge.*

In an action brought by an employer against a third person for willfully interfering with, enticing, or knowingly employing a servant

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MASTER AND SERVANT.

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## MASTER AND SERVANT—Continued.

(who had entered into a contract for a given period), without obtaining the consent of the employer, it was error to charge the jury that it would find for the plaintiff if the defendant at the time of the hiring "knew or ought to have known that said contract had not expired." The words of the statute "shall willfully interfere with, entice away, or knowingly employ" mean that the party hiring must have known of the contract at the time of the hiring, and not that he might have known by diligent or reasonable inquiry. The knowledge must exist at the time of the hiring. *Beale v. Yasoo Yarn Mill*, 807.

9. *Instruction on knowledge of prior hiring held incorrect.*

In such case it is reversible error to instruct the jury that if they believe from the evidence that the defendant had notice of any fact or circumstance sufficient to put an ordinarily prudent person upon inquiry, and that such inquiry would have developed the fact that the laborer's contract had not expired, and after such fact or circumstance came to defendant's notice he hired the tenant while the contract was in effect, to find for plaintiff. The knowledge of the first contract must exist at the time of the hiring, and mere circumstances which in themselves are insufficient to impute knowledge, but which must be coupled with other facts which would or might be disclosed by inquiry, do not supply the requisite proof. *Ib.*

10. *Instruction on ratification of breach of contract of hiring by continuing in service held incorrect.*

In an action by an employer against another for hiring a servant before his contract of service expired, where the evidence for the defendant showed a breach of the contract by the employer prior to the hiring by the defendant, it was error to instruct for the plaintiff that, even though the jury may believe from the evidence that one or more of the servant's family were discharged without cause, or that the servant or members of his family were occasionally laid off without cause, and notwithstanding these facts the servants continued after such facts in the employment and worked under his contract, this constituted a ratification of the contract under its terms as originally made. *Ib.*

11. *Instruction on good faith as defense to charge of wrongful hiring held erroneously refused.*

Where an employer of a laborer brings an action against another for wrongful hiring of the servant of the plaintiff before the end of his term of service, and where the evidence for the defense shows, or tends to prove, that the employer breached his contract by discharging members of the servant's family, whose service is embraced in the contract, it is error to refuse the defendant an instruction to the

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MORTGAGES.

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## MASTER AND SERVANT—Continued.

effect that if the servant told the defendant that he and members of his family had been discharged and that plaintiff had told servant to take his boy and go to the farm, and that the defendant, in good faith, believed such statements were true at the time of the hiring the jury should find for the defendant, even though such statements were not true in fact. *Beale v. Yasoo Yarn Mill*, 807.

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MORTGAGES.

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1. *Trusts. Agreement by complainant on foreclosure to apply certain proceeds to personal judgment held to create a trust.*

An agreement by the complainant in a suit to foreclose a mortgage, and who has bid in the land covered thereby at the sale thereof under the foreclosure decree, that if an objection to the confirmation of the sale made by the defendant who owns the land be withdrawn he will sell the land and apply the proceeds in excess to the amount to be paid by him therefor and credited on the amount found to be due him by the defendant to the payment of a personal judgment rendered against the defendant in the foreclosure decree, makes him, on the withdrawal of the objection and confirmation of the sale, a trustee of the land for the purpose stipulated in the agreement, and until he complies therewith a court of equity will not permit him to cause the personal judgment rendered against the defendant to be satisfied by the sale of other property of the defendant. *Weaver v. Turner*, 250.

2. *Foreclosure sale will be enjoined where tender by check sufficient, although money not actually paid into court.*

Where, in such case, the maker of the notes tenders to the holder in good faith the amount claimed to be due by her, by check, which is not accepted, but refused on the ground that the amount is not sufficient, and not on the ground it is not money, and the proof shows that the money was in the bank to the credit of the drawer of the check, and that it would have been paid if presented; and, where under the contract the holder of the mortgage and notes attempts to advance the unmatured debt on a theory of default, and advertises the property for sale, an injunction will lie to restrain the sale, and this is true though the bill only offers to pay the amount due, and does not actually pay the money into court, as the complainant should ordinarily do. *Tonkel v. Shields*, 462.

3. *Railroads. Foreclosure of mortgage extinguishment of stockholders' rights*

Where a railroad company has issued bonds, the payment of the interest and principal of which are secured by a mortgage on its franchise and property, and default is made in the payment of the interest, and

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MUNICIPAL CORPORATIONS.

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## MORTGAGES—Continued.

under the terms of the mortgage the franchise and property are sold, all rights of the stockholders in the railroad are by this foreclosure sale lost and destroyed. *Washington County v. Yasoo & M. V. R. Co. et al.*, 718.

## MUNICIPAL CORPORATIONS.

1. *Adverse possession. Possession must be exclusive, under claim of right, and for statutory period; city using railroad right of way as street held to acquire title to extent of use only.*

To acquire land by adverse possession, the possession must not only continue for the statutory period, but it must be exclusive and under claim of right; and, where a city uses a portion of a railroad right of way as a street for the passage of pedestrians and vehicles only, not excluding the railroad from the said land, it acquires only to the extent of the use, and has no right to place structures on the land, nor to permit others to do so. *Alabama & V. Ry. Co. v. Joseph et al.*, 454.

2. *Property owner held liable for interest on legal item of assessment from time assessment made final.*

Where a front-foot assessment is made against a city property owner under chapter 260, Laws of 1912, as amended by chapter 256, Laws 1914 (Hemingway's Code, sections 5941 to 5965, inclusive), and such assessment is composed of charges for different items of improvement, and the property owner contests the assessment in the courts and succeeds in having all the items of assessment declared illegal except one, he is still liable for interest on that item under section 23 of said chapter 260, Laws of 1912, as amended by chapter 256, Laws of 1914 (Hemingway's Code, section 5963), from the time the assessment was made final. *Buckley et al. v. City of Jackson*, 780.

3. *By tendering amount due on legal item of assessment, property owner may escape liability for interest.*

In such case the only manner in which the property owner could save himself from interest on the item finally held to be legal would have been to concede its legality and make a tender of the amount. *Ib.*

4. *New census may be ordered by Governor to reclassify municipalities only when returns show change in classification.*

Under sections 3308 and 3311, Code of 1906 (sections 5804 and 5808, Hemingway's Code), the census return must show a change in the classification of a municipality before the Governor is empowered to act in the matter. It is only when this change is thus shown that the Governor can investigate the matter, have a new census taken, and reclassify the municipality. *State ex rel. v. Metts*, 820.

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NEGLIGENCE

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## MUNICIPAL CORPORATIONS—Continued.

5. *Governor not authorized to reclassify city under census returns as made.* Where a municipality was classed as a city before the federal census of 1920 was taken, and the final return of this census showed it to be still a city, the Governor is without power to appoint a person to take a new census of the municipality or to reclassify it under these sections of the Code. *State ex rel. v. Mitts*, 820.

## NEGLIGENCE.

1. *Instruction on diminishment of damages for contributory negligence held erroneous.*

An instruction on diminishment for contributory negligence which told the jury to award such damages as bears the same proportion to the damages which would have been recoverable had not deceased been guilty of negligence that the negligence of deceased bears to the combined negligence of deceased and defendant is erroneous. *Yasoo & M. V. R. Co. v. Mullins*, 242.

2. *Master and servant. Negligence as to employee boarding car with defective step and his contributory negligence held for jury.*

Under Acts 1910, chapter 135 (Hemingway's Code, Section 502 and 503), providing that contributory negligence shall not bar a recovery, when the step of a flat car, which has been furnished by the defendant company for the purpose of transporting its employees to and from their work, was twisted or bent, and an employee was injured in attempting to use this bent step in boarding the train while moving, *held*, that, under the facts in evidence, it was a question for the jury as to whether, in furnishing a car with a defective step, the defendant was guilty of negligence which contributed to the injury, and that all questions of negligence and contributory negligence were properly submitted to the jury. *Tallahala Lumber Co. v. Holliman*, 308.

3. *Employee boarding moving train held guilty of contributory negligence requiring diminution of damages.*

Under the concurrent negligence statute (Laws 1910, chapter 135), providing that damages shall be diminished in proportion to the amount of negligence attributable to the person injured, where an employee suffered the loss of a leg by reason of an attempt to board a moving train, *held*, that, under the facts in evidence, the plaintiff was guilty of contributory negligence, and that a verdict for eighteen thousand dollars was excessive. *Ib.*

4. *Master and servant. Risk of railroad's negligence not assumed.*

Under the laws of this state the servant does not assume the risk, in cases against railroad companies, where the master is negligent. *Hines, Agent, v. Green*, 477.

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OFFICERS—PAYMENT.

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## OFFICERS.

1. *Bond of officer binding on every person who subscribes it.*

A bond, delivered and approved as a bond of a public officer required by law in order that he may hold and receive the emoluments of the office, is binding on every person who subscribes it under the provisions of section 3463, Code of 1906 (section 2801, Hemingway's Code), although the office is erroneously described therein. *State ex rel. v. Hundley et al.*, 355.

2. *Bond of officer security for duties subsequently imposed on him.*

The bond of a public officer is a security, not only for the performance of the duties incumbent on him when the bond was executed, but for such other duties, not different in kind, which the legislature may thereafter impose on him. *Ib.*

## PARTIES.

*Nonjoinder of party defendant to be raised by plea, and not by demurrer; plea should suggest party to be joined and necessity therefor.*

In such case the nonjoinder of a party should be raised by plea and not by demurrer. The general rule is that the nonjoinder of a party is to be raised by plea suggesting the party to be made a defendant and the necessity for the party omitted to be joined. *Belt et al. v. Adams*, 387.

## PARTITION.

*Charging defendant's interest with fee of complainant's solicitor error.*

Where there is a real contest between the complainants and the defendants as to whether or not the complainants are entitled to maintain their suit, and the partition of the property is resisted in good faith by the defendants, the defendants are entitled to be represented by counsel of their own choice, and it is error to charge their interest with any part of the fee of the solicitor of the complainants. *Brower et al. v. Rosenbaum & Little et al.*, 87.

## PAYMENT.

1. *Mortgagor suing for over-payment cannot recover interest on notes actually due.*

On a bill by a mortgagor to recover an amount paid in excess of the amount actually due, he was not entitled to recover interest owing on the notes actually due to the date of the payment. *Nelson v. Bishop*, 256.

2. *Application where payments made at different dates and before maturity under contract to apply proceeds on debts stated.*

Where a party bought lands on deferred payments making a series of

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 PLEADING AND PRACTICE.
 

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## PAYMENT—Continued.

notes and providing that interest on all notes shall be payable annually, and further providing that the buyer may sell timber on the lands sold and apply the proceeds on the notes *pro rata*, and where timber is sold and the proceeds applied to the debts at different dates and in different amounts, such payments should be applied first to paying the accrued interest on all the notes to the dates of payment, and then in reducing the principal by prorating it among the notes. This is especially true where none of the notes are due at the date of the payments. *Tonkel v. Shields*, 461.

## . PLEADING AND PRACTICE.

1. *Appeal and error. Motion attacking correctness of decision in effect a suggestion of error; motion to modify judgment held in effect an additional suggestion of error.*

A motion which only attacks the correctness of the decision is in effect a suggestion of error. Where a decision on appeal has been rendered against a party, and where a suggestion of error has been filed by such party and overruled, and where the judgment entered by the clerk is in accordance with the decision, no further attack on the decision is permitted, and a motion to modify the judgment, which only challenges the correctness of the decision of the court, is in legal effect an additional suggestion of error, and will be stricken from the files by the court of its own motion. *Crudup v. Roseboom*, 205.

2. *Charities. Bill held to show complainant had no right to enforce alleged trust.*

Where a bill in chancery to enforce an alleged trust shows that the trust, if any exist, is for the benefit of a named school, and is not brought in the name of the school, or by its trustees, but by parties living in the community who made some contribution to a fund to buy the alleged trust property for the use of the school, there is no such right in the complainant as will warrant equity in taking cognizance of the suit and rendering a decree, and where such bill is demurred to the demurrer ought to be sustained. *Freedman's Aid & Southern Education Soc. v. Scott et al.*, 299.

3. *Judgment. Filing bill to cancel title acquired under vendor's lien foreclosure held a direct and not a collateral attack.*

Where a will was filed to cancel a title acquired under a vendor's lien foreclosure suit in which it was alleged that such judgment was void for many reasons set forth in the bill, and where the former pleadings and proceedings were attached as exhibits to the bill, and where it was alleged, that the complainants, who were minor defendants in the former suit, did not have notice in said former suit, such attack

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 PLEADING AND PRACTICE.
 

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## PLEADING AND PRACTICE—Continued.

is a direct attack and not a collateral attack, although the complainant in the former suit was not made a defendant in the last suit; it being alleged that the complainant in the former suit was paid in full before the decree was rendered in the first suit. *Belt et al. v. Adams*, 387.

4. *Parties. Nonjoinder of party defendant to be raised by plea, and not by demurrer; plea should suggest party to be joined and necessity therefor.*

In such case the nonjoinder of a party should be raised by plea and not by demurrer. The general rule is that the nonjoinder of a party is to be raised by plea suggesting the party to be made a defendant and the necessity for the party omitted to be joined. *Ib.*

5. *Limitation of actions. Limitations may be set up by person entitled, and is not available by mere licensee of such person.*

As a general rule, the statute of limitation is personal to the person entitled to plead it, and cannot be set up by a third person who has acquired no property interest in the property. It is not available by a mere licensee of a person who might claim thereunder, but has not done so. *Alabama & V. Ry. Co. v. Joseph et al.*, 454.

6. *Judges. Relationship to attorney not a disqualification; suggestion of disqualification must be made before trial unless knowledge acquired subsequently.*

Under section 165 of the state Constitution of 1890, a judge is not disqualified to sit in a case pending before him merely because he is related to an attorney in the case. To constitute disqualification the attorney related to the judge must be interested in the subject-matter or *res* of the suit. A party desiring to suggest the disqualification of a judge in a case must do so before the trial of the case, unless his knowledge of the facts of disqualification was acquired subsequent to the trial of the case. *Shireman et al. v. Wildberger et al.*, 499.

7. *Appeal and error. Dismissal and nonsuit. Trial. Misjoinder of parties plaintiff cannot be urged on appeal unless notice given and misjoinder pleaded below; peremptory instruction against either party proper where evidence justifies it; plaintiff may take nonsuit at any time before verdict.*

Misjoinder of party plaintiffs in a suit cannot be taken advantage of on appeal unless notice was given and the misjoinder pleaded in the lower court. It is proper to grant a peremptory instruction against either party where the evidence justifies it. It is a legal privilege of a plaintiff to take a nonsuit in a case at any time before verdict. *Payne, Director General of Railroads, v. Stevens et al.*, 582.

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PRINCIPAL AND SURETY.

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## PLEADING AND PRACTICE—Continued.

8. *Cancellation of instruments. Petition held insufficient to state grounds for cancellation of corporation's deed to its secretary.*

A bill in equity by the grantor in a deed against the grantee to set aside and cancel such deed as a cloud upon the grantor's title, the grantor being a corporation, which alleges as grounds for cancellation of such deed that the consideration therein mentioned is "feigned and fictitious;" that the grantee in the deed was the secretary of the grantor corporation, and joined in the execution of the deed to himself, together with the president of the corporation; that the deed was not legally acknowledged by the president of the corporation—states no grounds for cancellation of such deed. *Mexican Gulf Land Co. v. Globe Trust Co. et al.*, 862.

## PRINCIPAL AND SURETY.

1. *Employer bound to report only facts justifying charge of larceny or embezzlement under indemnity bond.*

Where a surety company has executed a bond indemnifying an employer against loss by reason of any act of an employee constituting larceny or embezzlement, under a provision of the bond requiring the employer to give written notice to the company immediately upon becoming aware of any loss which might be made the basis of a claim thereunder, the employer is not bound to report his suspicions arising from unexplained irregularities or discrepancies in the books or accounts of the employee, but notice is only required after the employer has knowledge of such facts as would justify the charge of larceny or embezzlement. *Maryland Casualty Co. v. Hall*, 792.

2. *Surety under indemnity bond not liable for sums owing to employer by employee discharged by improper use of employer's other funds.*

Under an employer's indemnity bond, providing that the company shall not be liable thereunder for any sum owing to the employer by the employee at the commencement of the term of the bond, or for any money thereafter used directly or indirectly by the employee to discharge in whole or in part any debt or obligation contracted or incurred by the employee with the employer before or during the term of the bond, the surety company is not liable for any sum which was owing to the employer at the commencement of the bond, and which the employee attempted to discharge by the improper use of other funds of the employer. *Ib.*

See SUBROGATION.

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PUBLIC LANDS.

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## PUBLIC LANDS.

1. *State held to have acquired school sections only upon survey and extinguishment of Indian rights.*

The state of Mississippi acquired the right to the sections No. 16 granted to it for the use of schools by the Act of Congress of March 3, 1803, when, but not until, the right of occupancy of the Indian tribes was extinguished and the sections had been surveyed as provided by law. *City of Corinth et al v. Robertson*, 31.

2. *Federal act held controlling as to terms of trust of school lands in Chickasaw Cession.*

The terms of the trust upon which the land was granted to the state by the federal government for the use of schools in the Chickasaw Cession must be gathered from the Act of Congress of July 4, 1836, by which the grant was made. *Ib.*

3. *Act granting land to state for schools in Chickasaw Cession held not to require use for schools in particular township.*

The Act of Congress of July 4, 1836, by which land was granted to the state for the use of schools in the Chickasaw Cession, does not require any part of the land, its proceeds, or the interest thereon, to be used for schools in any particular township. *Ib.*

4. *Congressional act authorizing state to sell land reserved for schools does not affect trust under which state holds lands in Chickasaw Cession.*

The Act of Congress of May 19, 1852, authorizing the state to sell the land reserved for the use of schools, has no effect upon the terms of the trust under which the state held the lands granted to it for the use of schools in the Chickasaw Cession. *Ib.*

5. *Upon vesting of title to school lands in Chickasaw Cession, state has full power of disposal.*

After the title of the state to the land granted to it by the Act of Congress of July 4, 1836, for the use of schools in the Chickasaw Cession had vested, the state had full power to dispose of the land without the consent of Congress, and it was also beyond the power of Congress to change the terms of the grant. *Ib.*

6. *Railroad lessee of school section holding over after expiration of lease estopped to set up adverse claim.*

Where a railroad company, after the Constitution of 1890 went into operation, leased from a board of supervisors a right of way for a term of years, and under such lease constructed its right of way and track across the sixteenth section lands held in trust by the state, and continued in possession after the expiration of its lease without giving notice of its intention to claim title and without surrendering

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RAILROADS.

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## PUBLIC LANDS—Continued.

possession of the said right of way, it cannot under such facts set up an adverse claim to the county's reversion and assert a hostile title. *Yazoo & M. V. Co. v. Sunflower County*, 93.

7. *Board of supervisors cannot superimpose on a seven-year lease of sixteenth section land an option to release at a stipulated rental.*

The statute authorizing the lease of sixteenth section does not empower the board of supervisors to superimpose upon a seven-year lease an option to the lessee to re-lease the land at a stipulated rental. The statute (chapter 40, Laws 1898) merely gives the lessee a preference to re-lease. A failure to comply with the original lease takes away the option. *McPherson et al. v. Richards et al.*, 219.

## RAILROADS.

1. *Libel and slander. Request by ex-employee held to release employer from liability on account of information furnished.*

In a libel suit by an ex-employee of a railroad company against such company based upon a statement to a prospective employer in response to a letter written by plaintiff to defendant to forward to a prospective employer information about plaintiff's personal character, habits, and ability and as to the cause of his leaving their employment, such information furnished in response to such letter cannot form the basis of a libel suit, where it expressly released defendant from liability for damages on account of furnishing such information. *Burdett v. Hines et al.*, 66.

2. *Effect of consolidation on right of way over school section stated.*

When the Yazoo & Mississippi Valley Railroad Company created by Laws of 1882, chapter 541, page 838, consolidated with the Louisville; New Orleans & Texas Railroad Company, the effect was to create a new corporation subject to the existing laws of state; and under section 211 of the state Constitution of 1890 the fee in the sixteenth section lands which had not then passed could not thereafter become vested in a corporation or an individual; and a right of way laid out after such consolidation, which occurred in October, 1892, over sixteenth section lands, did not vest any right or title to said sixteenth section lands under section 7 of the Charter of the original Yazoo & Mississippi Valley Railroad Company. *Yazoo & M. V. R. Co. v. Sunflower County*, 92.

3. *Sufficiency of evidence.*

In a suit for death by negligence of railroad, held, that evidence was sufficient to support verdict by reasonable inferences drawn from facts and circumstances. *Yazoo & M. V. R. Co. v. Mullins*, 242.

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RAILROADS.

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## RAILROADS—Continued.

4. *Adverse Possession. Possession must be exclusive, under claim of right, and for statutory period; city using railroad right of way as street held to acquire title to extent of use only.*

To acquire land by adverse possession, the possession must not only continue for the statutory period, but it must be exclusive and under claim of right; and, where a city uses a portion of a railroad right of way as a street for the passage of pedestrians and vehicles only, not excluding the railroad from the said land, it acquires only to the extent of the use, and has not right to place structures on the land, not to permit others to do so. *Alabama & V. Ry. Co. v. Joseph et al.*, 454.

5. *Adverse Possession. Running trains over railroad right of way held use of entire right of way in absence of inclosure by adverse claimant and adverse use.*

The running of trains over the right of way is a user of its entire right of way, unless some part is inclosed by the adverse claimant and used adversely to the railroad for the statutory period. *Ib.*

6. *Master and servant. Assault on servant by another servant in course of employment actionable.*

Where a master employs a dangerous, quarrelsome, and vicious servant, or retains him in his service after knowledge of his dangerous character, and such servant, while in the course of his employment and in furtherance of the master's business, commits an assault on another servant, who is also employed in the master's business and is acting in furtherance of the master's business, the master is liable for the injuries resulting from the wrongful assault. *Hines, Agent, v. Green*, 476.

7. *Master and servant. Railroad engineer's assault on conductor held actionable.*

Where a conductor of a switching crew, including an engineer, was engaged in moving an engine and passenger cars from one point in the yard to another point therein, and where to complete the movement it is necessary to pass through a switch, and where the engine was halted because the switch was not thrown, and the engineer because of such fact assaults the conductor because the switch is not thrown, so that the engine may proceed to its destination, and where it was the conductor's duty to have the switch thrown, the engineer and the conductor are acting in the course of their employment, about the master's business, and the master is liable for a wrongful assault by the engineer on the conductor. *Ib.*

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RAILROADS.

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## RAILROADS—Continued.

8. *Commerce. Rule for determining applicability of federal Employers' Liability Act stated; federal Employers' Liability Act held inapplicable to action for assault upon railroad employee by engineer.*

When applicability of the federal Employers' Liability Act (U. S. Comp. St., sections 8657-8665) is involved, or it is to be determined in a suit whether it is applicable or not, it may generally be determined by inquiring whether at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as, practically, to be a part of it. The facts in this case do not bring it within this rule as the cars being switched neither carried interstate commerce nor were they to be used immediately in interstate commerce, nor had they been used immediately before in such commerce, but were only used therein whenever the exigencies of the railroad called them into service for that purpose. *Hines Agent v. Green*, 476.

railroad called them into service for that purpose. *Ib.*

9. *Master and servant. Risk of railroad's negligence not assumed.*

Under the laws of this state the servant does not assume the risk, in cases against railroad companies, where the master is negligent. *Ib.*

10. *Death. Verdict in excess of present cash value of expectancy under federal act reduced.*

Where in a suit against a railroad company for an injury to a servant no case for punitive damages is made, and where the court instructs the jury that the rules applicable to the federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665) governs the amount of damages, and where the verdict is in excess of the amount of the present cash value of that part of the expectancy which they could recover under such rule, but in fact the liability is governed by state law, the verdict will not be permitted to stand, unless a remittitur is entered, reducing the amount to such sum as could stand under such rule of liability. *Ib.*

11. *Carriers. Carrier not required to accept unattended child of tender years, but, if it does so, is liable for neglect of duty; if carrier seeks to limit ticket agent's power to contract, limitations must be posted or brought to passenger's attention.*

The carrier of passengers is not required to accept, unattended, a child of tender years needing special attention, but it may do so, and, if it does, it is liable for injury caused by its neglect of duty. The ticket agent generally has power to make contracts for the carrier for the carriage of passengers, and such contracts are within the scope of his apparent duties. If the carrier seeks to limit his powers, it must have its rules limiting the agent's powers posted in its passenger depots, or else it must call the passenger's attention to the limitation, or bring it to his attention, to prevent liability for breach

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RAILROADS.

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## RAILROADS—Continued.

of a special contract by its ticket agent. *Yasoo & M. V. R. Co. v. O'Keefe*, 536.

12. *Carriers. Instructions as to liability for carrying child past destination in violation of special contract held not erroneous.*

In a suit for damages for failure to put a child off at its destination, under a special contract so to do, to instruct the jury that, if the jury believed the ticket agent agreed that the conductor would put the child off at its destination, and that the conductor promised the same thing, and if they believed that it was within the scope of the authority of these employees to bind the railroad company by an agreement or promise made by the conductor and ticket agent, that then the defendant would be liable for the conductor's failure to put the child off, is not erroneous, where the evidence sustains such facts. The fact that the conductor was without authority to make a special contract would be immaterial, where the ticket agent had such power and did make such contract. It merely imposed on the plaintiff the necessity of proving more than was needed under the law, it being sufficient to prove that the ticket agent had power to and did make such contract, and that the carrier breached its duty thereunder. *Ib.*

13. *Appeal and error. Carriers. Where verdict is excessive, appellate court may reverse and remand or affirm on remittitur; one thousand five hundred dollars held excessive for carrying child past destination, frightening it, and causing it to contract cold.*

Where, on a trial for carrying a child of tender years beyond its destination in violation of a special contract, the verdict is grossly excessive, the court may reverse and remand the cause, or it may affirm on condition that plaintiff will enter a *remittitur* to a named amount, deemed sufficient by the appellate court. The evidence examined, and verdict in this case *held* excessive. *Ib.*

14. *Burden imposed by prima facie statute.*

Under our *prima-facie* statute (section 1985, Code of 1906; section 1645, Hemingway's Code), where it is shown by proof that the injury was caused by the running of cars, and it is also established that the speed of the cars was unlawful at the time of the injury, it is incumbent upon the railroad company, before it is entitled to a peremptory instruction, to explain and show how the injury occurred, and that it was not proximately caused by its negligence in the running of the cars at an unlawful rate of speed; and, unless the evidence exonerates the railroad company from negligence proximately causing the injury, the burden imposed by the *prima-facie* statute has not been met. *Bonds v. Mobile & O. R. Co.*, 548.

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RAILROADS.

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## RAILROADS—Continued.

15. *Adverse possession. Adverse occupation of railroad right of way for ten years gives title.*

Where a stranger in title to a railroad company obtains adverse, open, notorious, and exclusive possession of a part of its right of way and so occupies it for a period of ten years, claiming it as his own, he thereby obtains title by adverse possession. *Mobile & O. R. Co. v. Strain*, 697.

16. *Adverse possession. User of railroad right of way and cultivation of garden under claim of title gives title after ten years.*

Where the owner of property fences in a part of a railroad right of way immediately adjoining his property and continuously uses it and cultivates it as a garden, claiming title thereto, and has exclusive possession of it for a period of ten years, he acquired title thereto by adverse possession. *Ib.*

17. *Adverse possession. Permissive use of right of way personal, and permission ceases when permitted party sells his adjoining property in connection with which permission given.*

Where the owner of a hotel by permission fences an adjoining lot which is a part of the right of way of a railroad company, this permissive use of the right of way is personal and ceases when the hotel is sold; and title by adverse possession may be obtained of this lot by remote grantees of the property by exclusive, open, notorious, and adverse possession thereof under claim of title for a period of ten years. This possession is constructive notice of their adverse claim to the railroad company. *Ib.*

18. *Adverse possession. Title may be obtained to part of railroad right of way not necessary to business as common carrier.*

Section 184 of the Constitution of 1890 makes railroads public highways. Title by adverse possession may be acquired of a part of its right of way not in actual use, and not necessary for the transaction of its business as a common carrier. *Ib.*

19. *Foreclosure of mortgage extinguishment of stockholders' rights.*

Where a railroad company has issued bonds, the payment of the interest and principal of which are secured by a mortgage on its franchise and property, and default is made in the payment of the interest, and under the terms of the mortgage the franchise and property are sold, all rights of the stockholders in the railroad are by this foreclosure sale lost and destroyed. *Washington County v. Yazoo & M. V. R. Co. et al.*, 718.

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RAILROADS.

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## RAILROADS—Continued.

20. *Carriers. May contract to carry articles though no tariff rate filed; liable for loss of jewelry though no tariff rate filed; "Public highways;" "Common carriers."*

Under section 184 of the state Constitution of 1890, and under section 4839, Code of 1906 (section 7624, Hemingway's Code), railroads are common carriers and public highways over which persons have a right to ship articles not dangerous to persons or other property; and a railroad may contract to carry articles though it has filed no tariff rate with the State Commission, and where it accepts jewelry and other articles of special value it is liable for their loss resulting from dishonesty or negligence of its employees. *Illinois Cent. R. Co. v. King*, 734.

21. *Carriers. Agent's failure to specify all articles in bill of lading held waiver of nonliability clause.*

Where a shipper carries articles of freight to a freight agent of a railroad company in charge of its business, and discloses the nature and value of the articles to be shipped by freight, and such agent writes only one article in the bill of lading when the shipment contains many articles, the company cannot escape responsibility for the negligence or dishonesty of its employees because the bill of lading contains a clause that "no carrier will be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariff, unless a special agreement to do so and the stipulated value of the articles are indorsed hereon." Where the information is furnished the agent in charge, and he fails to write the data on the bill of lading, it must be treated as having waived the provision. *Ib.*

22. *Waters and water courses. Evidence held insufficient to sustain judgment against railroad company for flooding lands by filling in trestle.*

In a suit against a railroad company for damages to growing crops caused by filling in a portion of a trestle over a stream and thereby obstructing the flow of the flood waters of the stream, so as to cause the waters to be impounded on the lands of plaintiff to an increased depth, and to remain on the land longer than they would if the trestle had not been filled, where the undisputed testimony shows that there was an excessive rainfall and several extraordinary overflows, which flooded the entire valley of the stream, both above and below the railroad embankment, a judgment for plaintiff will be reversed, where there is no testimony which would enable the jury to separate the damages attributable to the wrongful act of the railroad company from that caused by the excessive rains on the crops and the consequent flooding of the land independent of the trestle. *Davis, Fed. Agent, et al. v. Hambrick et al.*, 859.

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RES ADJUDICATA—SCHOOL DISTRICTS.

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## RES ADJUDICATA.

*See* JUDGMENT.

## SCHOOLS AND SCHOOL-DISTRICTS.

1. *State agent administering trust fund for educational purpose under state law not personally liable to cestui que trust for diversion resulting from compliance with law.*

When the agent or officer of a state charged by its laws with the duty of administering a fund held in trust by the state for educational purposes, administers it in accordance with the laws passed by the Legislature of the state for that purpose, he is not personally liable to the cestui que trust for any diversion of the trust fund which may result because of his having disposed of it as he was directed by law so to do. *City of Corinth v. Robertson*, 31.

2. *Neither municipal treasurer nor district liable for diversion of interest on Chickasaw school fund where administered according to law.*

The treasurer of a municipality constituting a separate school district in receiving and disbursing the interest on the Chickasaw school fund apportioned to the separate school district under the laws of the state for the maintenance of its public schools acts as the state's agent, and if he complies with the law in making the disbursement, neither he nor the municipality can be held liable for any diversion of such interest from the use for which the fund is held by the state, which may thereby result from the method adopted by the state for administering the trust. *Ib.*

3. *In proceedings to validate bond issue, legality of district cannot be inquired into beyond record of organization.*

In a proceeding under chapter 28, Laws Ex. Sess. 1917, to validate bonds issued by the board of supervisors for a consolidated school district, such school district having, under the law, been organized by the county board of education, any attack made on the organization of such school district is a collateral attack; therefore in such validation proceeding there can be no inquiry as to the legality of the organization of the consolidated school district beyond what the record of its organization by the board of education shows on its face. *Lincoln County v. Wilson et al.*, 837.

4. *Date of resolution for issue of bonds of consolidated district held not to render issue void.*

The fact that the resolution of the board of supervisors declaring its purpose to issue bonds for a consolidated school district under chapter 207, Laws of 1920, antedates by four days the resolution of the county board of education organizing such consolidated school district, the former resolution not having been published until after

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STATUTES CONSTRUED—SUBROGATION.

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## SCHOOL AND SCHOOL DISTRICTS—Continued

the resolution organizing the school district had been adopted, was not fundamental, but a mere irregularity, and did not render the bonds of said school district void. *Ib.*

## STATUTES AND STATUTORY CONSTRUCTION.

1. *Executors and administrators. Statutory requirement that executor file vouchers for disbursements for annual accounts mandatory.*

Section 2121, Code 1906 (Hemingway's Code, sec. 1789), making it the duty of an executor to produce and file with his annual accounts vouchers for disbursements made, is mandatory, and it is not within the discretion of the chancellor to dispense at will with this requirement of the statute. *Ridgeway et al. v. Jones*, 22.

2. *Courts. Act fixing term of chancery court held not repealed.*

The provision of chapter 262, Laws 1916, that the chancery court of George county shall convene on the fourth Monday of January and continue in session six days, was not repealed by chapter 257, Laws 1916. *Weaver v. Turner*, 250.

## STREET RAILROADS.

*Street railroad distinguished from commercial railroad for imposition of privilege tax.*

Under section 3874, Code of 1906, as amended by Acts 1920, chapter 104, section 60, which reads as follows: "On each individual, firm or corporation operating a street or interurban car line, on each mile or fraction thereof, thirty dollars—*held*, on the evidence introduced in the case, that the Gulfport & Mississippi Coast Traction Company is a street railroad corporation operating a street or interurban car line, and is not a commercial railroad which could be classified as a third class railroad by the State Railroad Commission, and the city assessment of fifteen dollars per mile on the line in the city is valid under the law. *Gulfport & M. C. Traction Co. v. City of Biloxi*, 626.

## SUBROGATION.

*A Surety paying a judgment has all the equities of the judgment creditor.*

A surety paying a judgment against himself, his principal, and another, has, under section 3735. Code of 1906, Hemingway's Code, section 2911, all of the liens and equities therein that the judgment creditor had both against the surety's principal and the other person against whom the judgment was rendered. *Quinn v. Alexander et al.*, 690.

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SUFFICIENCY OF EVIDENCE—TAXATION.

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## SUFFICIENCY OF EVIDENCE.

In a suit for death by negligence of railroad, *held*, that evidence was sufficient to support verdict by reasonable inferences drawn from facts and circumstances. *Yasoo & M. V. R. Co. v. Mullins*, 242.

## SUNDAY.

1. *Owner not relieved of liability to broker because of signing contract on Sunday.*

Where a principal and agent made a contract on a secular day by which the agent agreed to sell real estate for the principal on given terms, and such agent on secular days procures a purchaser and drafts a written contract, which the principal modifies and signs on Sunday, and which the agent on a secular day gets the purchaser to accept and sign on a secular day, the principal cannot escape liability for paying the agent's commission earned because of the fact that the principal signed the contract on Sunday. *Shireman et al. v. Wildberger et al.*, 199.

2. *Sunday contract void, but recovery may be had for quantum valebat where property accepted on subsequent secular day.*

A written contract executed on Sunday is void, and no recovery can be had thereon, but recovery may be had for *quantum valebat* in an action of *assumpsit* upon an implied promise to pay for property which was accepted and converted upon a subsequent secular day. *A. Goletti, Inc., v. Andrew Gray Co.*, 646.

## TAXATION.

1. *Exemption of factories includes property necessary to operation only; "manufacturing plant."*

Under chapter 100, Acts 1916 (Hemingway's Code, sections 6878, 6879), the exemption allowed goes only to the manufacturing plant, which includes those things necessary in and to its operation. The act intends to exempt the real estate, buildings, machinery, improvements, and equipments, and other personal property, forming a part of, and belonging to, the plant, and essential to and necessarily used in its operation. *Adams County v. National Box Co.*, 598.

2. *Exemption statutes strictly construed against exemptions; exemption statute construed; raw materials and finished products not part of factory exempted.*

Exemption statutes are to be strictly construed against exemptions to persons or corporations for gain; and chapter 100, Acts 1916 (Hemingway's Code, sections 6878, 6879), does not exempt raw materials and finished products on hand belonging to a factory, as they are not a part of the manufacturing plant, nor does it exempt a steam-

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TAXATION—TRIAL.

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## TAXATION—Continued.

boat used exclusively in transporting logs to the factory for manufacturing purposes, it being no essential part of the plant used directly in its operation. *Ib.*

3. *Exemptions of factories includes property necessary to operation only; "manufacturing plant."*

Under chapter 100, Acts 1916 (Hemingway's Code, sections 6878, 6879), the exemption allowed goes only to the manufacturing plant, which includes those things necessary in and to its operation. The act intends to exempt the real estate, buildings, machinery, improvements, and equipments, and other personal property, forming a part of, and belonging to, the plant, and essential to and necessarily used in its operation. *Adams County v. National Box Co.*, 598.

4. *Exemption statutes strictly construed against exemptions; exemption statute construed; raw materials and finished products not part of factory exempted.*

Exemption statutes are to be strictly construed against exemptions to persons or corporations for gain; and chapter 100, Acts 1916 (Hemingway's Code, sections 6878, 6879), does not exempt raw materials and finished products on hand belonging to a factory, as they are not a part of the manufacturing plant, nor does it exempt a steamboat used exclusively in transporting logs to the factory for manufacturing purposes, it being no essential part of the plant used directly in its operation. *Ib.*

5. *Objection to assessment on ground of exemption precludes company from raising regularity of assessment on appeal.*

Objection to an assessment of a company on the ground that it is exempt from taxation precludes the company from raising the point on appeal that the assessment was not made as required by law in assessing corporations, nor can such point be raised where the record evidence fails to show that the company is a corporation. *Ib.*

## TENANCY IN COMMON.

*Occupancy by one tenant with payment of taxes insufficient as ouster.*

The occupancy and cultivation of land by one tenant in common and her husband, together with the payment of taxes on the land and the purchase of outstanding tax titles, does not amount to an ouster of the other tenants in common. *Humphrey et al. v. Seale*, 207.

## TRIAL.

1. *Party suing for blocking of crossing cannot testify to length of blocking in rebuttal.*

Where a suit for personal injury is predicated upon blocking a crossing

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TRIAL—TRUSTS.

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## TRIAL—Continued.

for more than the statutory period, and the plaintiff testifies as to the injury and introduces an ordinance prohibiting the blocking of a street crossing for more than five minutes, but fails to testify in his chief examination that the crossing was blocked longer than five minutes, he is not entitled to testify to such fact in rebuttal by reason of section 1985, Code of 1906 (Hemingway's Code, section 1645. *Mock v. Hines*, 111.

2. *Instructions must be considered as a whole.*

The instructions given by the trial court in a jury trial are to be taken and considered as a whole, one as supplementing or modifying another, and if when so construed they present the law fully and fairly, the court will not reverse for the giving of a single instruction for one party, though it may not be free from criticism. *Mutual Life Ins. Co. v. Vaughan*, 370.

## TRUSTS.

1. *Schools and school districts. State agent administering trust fund for educational purpose under state law not personally liable to cestui que trust for diversion resulting from compliance with law.*

When the agent or officer of a state charged by its laws with the duty of administering a fund held in trust by the state for educational purposes, administers it in accordance with the laws passed by the Legislature of the state for that purpose, he is not personally liable to the cestui que trust for any diversion of the trust fund which may result because of his having disposed of it as he was directed by law so to do. *City of Corinth v. Robertson*, 31.

2. *Agreement by complainant on foreclosure to apply certain proceeds to personal judgment held to create a trust.*

An agreement by the complainant in a suit to foreclose a mortgage, and who has bid in the land covered thereby at the sale thereof under the foreclosure decree, that if an objection to the confirmation of the sale made by the defendant who owns the land be withdrawn he will sell the land and apply the proceeds in excess of the amount to be paid by him therefor and credited on the amount found to be due him by the defendant to the payment of a personal judgment rendered against the defendant in the foreclosure decree, makes him, on the withdrawal of the objection and confirmation of the sale, a trustee of the land for the purpose stipulated in the agreement, and until he complies therewith a court of equity will not permit him to cause the personal judgment rendered against the defendant to be satisfied by the sale of other property of the defendant. *Weaver v. Turner*, 250.

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U. S. CONSTITUTION—VENDOR AND PURCHASER.

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## U. S. CONSTITUTION CITED AND CONSTRUED.

18th Amend. Intoxicating liquors. The Eighteenth Amendment and the Volstead Act do not supersede or abrogate the existing state prohibition law. *Kysar v. State*, 79.

## U. S. STATUTES CITED AND CONSTRUED.

March 3, 1803. Public lands. State held to have acquired school sections only upon survey and extinguishment of Indian rights. *City of Corinth v. Robertson*, 31.

July 4, 1836. Public lands. Federal act held controlling as to terms of trust of school lands in Chickasaw Cession. Upon vesting of title to school lands in Chickasaw Cession, state has full power of disposal. Act granting land to state for schools in Chickasaw Cession held not to require use for schools in particular township. *City of Corinth v. Robertson*, 31.

May 19, 1852. Public lands. Congressional act authorizing state to sell land reserved for schools does not affect trust under which state holds lands in Chickasaw Cession. *City of Corinth v. Robertson*, 31.

§§ 8604a-8604aa. Carriers. Initial carrier's liability ends on delivery to interstate point designated in its bill of lading. *Yazoo & M. V. R. Co. v. Norman*, 636.

§§ 8657-8665. Commerce. Rule for determining applicability of federal Employers' Liability Act stated; federal Employers' Liability Act held inapplicable to action for assault upon railroad employee by engineer. Death. Verdict in excess of present cash value of expectancy under federal act reduced. *Hines, Agent, v. Green*, 476.

Volstead Act. Intoxicating liquors. Eighteenth Amendment and Volstead Act do not supersede or abrogate existing state prohibition law. *Meriwether v. State*, 435.

## VENDOR AND PURCHASER.

*Wills. Foreign will ineffective as conveyance until probated, when it relates back; purchaser with notice of will takes subject to probate.*

A will made and probated in a foreign state has no effect as a conveyance as to property in this state until the same is probated. But when it is probated here it will relate back to the death of the testator and be given effect unless the property or some of it has been acquired in good faith for value by a person without notice of the existence of the will. A person buying with notice of the will takes the property subject to the will being probated. *Belt et al. v. Adams*, 387.

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WAR—WILLS.

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## WAR.

*Alien enemy may defend and hence may recover property distrained.*

A proceeding to recover property which has been seized under a distress for rent is essentially defensive in its nature, and an alien enemy, whose property has been seized under a distress for rent, may maintain the statutory proceedings to recover the property and assert such defensive rights as he may have under the lease. *Fronkling v. Berry*, 763.

## WAREHOUSEMEN.

*Warehouseman storing goods in place different from that agreed on does so at his own risk.*

Where a warehouseman has contracted to store goods in a particular place, and breaches his contract and stores them in a different place, it is at his own risk, and he is liable for any damage or injury to the goods which occurs, even without his fault or negligence. *Tallahatchie Compress & Storage Co. v. Hartshorn*, 662.

## WATERS AND WATERCOURSES.

*Evidence held insufficient to sustain judgment against railroad company for flooding lands by filling in trestle.*

In a suit against a railroad company for damages to growing crops caused by filling in a portion of a trestle over a stream and thereby obstructing the flow of the flood waters of the stream, so as to cause the waters to be impounded on the lands of plaintiff to an increased depth, and to remain on the land longer than they would if the trestle had not been filled, where the undisputed testimony shows that there was an excessive rainfall and several extraordinary overflows, which flooded the entire valley of the stream, both above and below the railroad embankment, a judgment for plaintiff will be reversed, where there is no testimony which would enable the jury to separate the damage attributable to the wrongful act of the railroad company from that caused by the excessive rains on the crops and the consequent flooding of the land independent of the trestle. *Davis et al. v. Hambrick et al.*, 859.

## WILLS.

1. *Vendor and purchaser. Foreign will ineffective as conveyance until probated, when it relates back; purchaser with notice of will takes subject to probate.*

A will made and probated in a foreign state has no effect as a conveyance as to property in this state until the same is probated. But when it is probated here it will relate back to the death of the testa-

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WILLS.

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## WILLS—Continued.

tor and be given effect unless the property or some of it has been acquired in good faith for value by a person without notice of the existence of the will. A person buying with notice of the will takes the property subject to the will being probated. *Belt et al. v. Adams*, 387.

2. *No statute of limitations as to probate of will.*

In this state there is no statute limiting the time in which a will may be probated. *Fatheree v. Lawrence*, 33 Miss. 585, cited. *Ib.*

Att.  
13/1/22

















